A

Azami bin Ahmad dan satu lagi lwn Mohd Yunan bin Che Ya

MAHKAMAH TINGGI (KUANTAN) — RAYUAN NO 12–35 TAHUN 2007

B

VT SINGHAM PK

10 AUGUST 2009

C

Ganti rugi (Kecederaan Diri atau Kematian) — Rayuan — Rayuan terhadap award yang dibuat — Sama ada mahkamah perlu mengambilkira 'overlapping' walaupun tiada hujahan daripada pihak penentang — Sama ada award untuk 'pain and suffering' dan 'loss of amenities' dan sebarang 'disabilities' tidak boleh diberi secara berasingan bagi setiap satu kecederaan — Sama ada perbelanjaan perubatan masa hadapan dan 'pain and suffering' untuk pembedahan masa hadapan dibuktikan

D

Lalu Lintas Jalan — Kecuaian — Perlanggaran antara motosikal dan motolori treler — Motolori treler dalam keadaan berhenti — Motosikal merempuh bahagian belakang treler — Pembahagian liabiliti — Sama ada pemandu motolori cuai kerana gagal meletakkan tanda amaran di belakang motolori — Sama ada pemandu motosikal perlu lebih bertanggungjawab kerana dalam pergerakan — Sama ada pemandu motorsikal menanggung kecuaian sertaan 20%

E

F

Tort — Kecuaian — Kecuaian sertaan — Kemalangan jalan raya — Sama ada plaintif boleh dipertanggungjawabkan atas kecuaian sertaan di mana defendan tidak memberi keterangan

G

Tort — Kecuaian — Kemalangan jalan raya — Perlanggaran antara motosikal dan motolori treler — Pembahagian liabiliti — Sama ada pemandu motolori cuai kerana gagal meletakkan tanda amaran di belakang motolori — Sama ada pemandu motosikal menanggung kecuaian sertaan 20% — Sama ada doktrin res ipsa loquitur terpakai

H

I

Defendan pertama telah meletakkan motolorinya bersama treler di sebelah kiri jalan di mana sebahagian motolori berada di atas jalan raya dan sebahagian di atas bahu jalan. Plaintif ('SP4') telah menunggang motosikalnya dan telah merempuh motolori tersebut di bahagian tayar belakang sebelah kanan treler. Defendan pertama tidak memberi keterangan semasa perbicaraan. Hakim mahkamah sesyen yang bijaksana telah

bergantung kepada keterangan pegawai penyiasat ('SP2'), plaintif, laporan polis plaintif, laporan polis defendan pertama, rajah kasar dan gambar-gambar polis dan telah mendapati defendan pertama menanggung 100% liabiliti dalam kemalangan tersebut. Laporan polis plaintif dan defendan pertama tidak dikemukakan sebagai keterangan sama ada melalui plaintif atau melalui SP2 atau ditandakan sebagai ekshibit. Hakim mahkamah sesyen telah mengawardkan RM213,000 untuk ganti rugi am dan RM23,224 sebagai ganti rugi khas kepada plaintif. Defendan-defendan telah merayu terhadap keputusan hakim mahkamah sesyen tersebut.

Diputuskan, membenarkan rayuan defendan-defendan:

(1) Hanya terdapat satu isu utama untuk menentukan liabiliti terhadap defendan pertama, iaitu, sama ada terdapat sebarang tanda amaran yang diletak di belakang motolori defendan pertama seperti dikehendaki di bawah k 101A(2) Kaedah-Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) Motor 1959. Plaintif telah menyatakan tidak ada tanda amaran dan keterangan itu adalah disokong oleh SP2. Keterangan ini tidak disangkal (lihat perenggan 7–8).

(2) Hanya kerana defendan pertama tidak memberi keterangan, ini bukan bermakna bahawa defendan pertama patut didapati 100% cuai melainkan terdapat keterangan bahawa defendan pertama cuai. Mahkamah perbicaraan mesti menilai keseluruhan keterangan, secara kehakiman, sama ada, pertama, defendan pertama cuai dan bertanggungjawab terhadap kemalangan itu, dan kedua, sekiranya defendan pertama didapati cuai, sama ada plaintif telah menyumbang kepada kemalangan tersebut (lihat perenggan 16).

(3) Doktrin res ipsa loquitur tidak terpakai di atas fakta kes ini kerana plaintif mengetahui bagaimana kemalangan berlaku dan apakah punca yang menyebabkan kemalangan (lihat perenggan 18).

(4) Hakim mahkamah sesyen telah khilaf apabila beliau merujuk kepada dua laporan polis dalam alasan penghakiman yang tidak dikemukakan atau ditanda sebagai keterangan ataupun dipersetujui di peringkat mahkamah perbicaraan (lihat perenggan 26(2)).

(5) Award hakim mahkamah sesyen untuk ganti rugi am adalah melampau dan tidak mengikut trend dan terkhilaf di atas prinsip bagaimana award harus diberi apabila plaintif mengalami beberapa jenis kecederaan. Award yang diberi oleh hakim mahkamah sesyen di mana award-award yang diberi berasingan bagi sesuatu kecederaan dijumlahkan tanpa mengambilkira 'overlapping' adalah satu 'misdirection'. Hakim perbicaraan sepatutnya mengambilkira 'overlapping' jika kes itu adalah

satu keadaan di mana mahkamah perlu mengambil kira 'overlapping' walaupun tidak ada hujah daripada pihak penentang (lihat perenggan 33–34 & 36).

(6) Award untuk *pain and suffering* dan *loss of amenities* dan sebarang *disabilities* tidak boleh diberi secara berasingan bagi setiap satu kecederaan kerana *pain and suffering* bagi sebahagian kecederaan harus diambilkira bersama dan tidak boleh diberi award secara berasingan dan seterusnya menjumlahkan award tersebut seperti yang dibuat oleh hakim mahkamah sesyen yang bijaksana (lihat perenggan 37).

(7) Perbelanjaan perubatan masa hadapan dan *pain and suffering* untuk pembedahan di masa hadapan yang diawardkan oleh hakim mahkamah sesyen tidak dibuktikan bahawa telah dibelanjakan atau mesti diteruskan oleh plaintif (lihat perenggan 38).

(8) Keputusan hakim mahkamah sesyen terhadap liabiliti bahawa defendan pertama bertanggungjawab 100% bagi kemalangan tersebut diketepikan dan digantikan bahawa defendan pertama menanggung 80% dan kecuaian sertaan terhadap plaintif adalah 20%. Award berjumlah RM213,000 bagi ganti rugi am diketepikan dan diganti dengan RM131,000 (lihat perenggan 40).

[English summary

The first defendant had parked his lorry beside a trailer on the left side of the road where few lorries were on the highway and few on the shoulder of the road. The plaintiff ('SP4') was travelling on his motorcycle and had collided into the lorry at the right back tyre of the trailer. The first defendant had not testified during the trial. Learned sessions court judge had relied on the evidence of the investigating, the plaintiff, the plaintiff's police report, the first defendant's police report, the sketch plan and the police photographs and had found that the first defendant was 100% liable in the said accident. Neither was the plaintiff's police report and the first defendant produced as evidence by the plaintiff or by SP2 or marked as an exhibit. The sessions court judge had awarded RM213,000 for general damages and RM23,224 for special damages to the plaintiff. The defendants appealed against the decision of the sessions court judge.

Held, allowing the defendants' appeal:

(1) There was one main issue to determine the liability of the first defendant ie whether there was any warning signs placed at the back of the first defendant's lorry as stipulated under r 101A(2) of the Vehicles (Construction and Use) Rules 1959. The plaintiff had submiited that

there was no warning sign and that evidence was supported by SP2. This evidence was not rebutted (see paras 7–8).

(2) The fact that the first defendant had not testified did not mean that he should be found 100% negligent unless there was evidence that the first defendant was negligent. The trial court must evaluate the overall evidence judicially as to whether, firstly, the first defendant was negligent and responsible for the accident; and secondly, if the first defendant was found negligent, whether the plaintiff had contributed to the accident (see para 16).

(3) The doctrine of res ipsa loquitur was not applicable on the facts of this case as the plaintiff knew how the accident happened and what was the cause of it (see para 18).

(4) The sessions court judge had erred when he referred to the two police reports in the grounds of judgment that was neither produced or marked as evidence nor agreed at the trial court stage (see para 26(2)).

(5) The sessions court judge's award for general damages was excessive and did not follow the trend and had erred on the principles of how an award should be made when the plaintiff suffered various injuries. The award made by the sessions court judge where the awards were given separately for an injury was calculated without considering the overlapping was a misdirection. The trial jusge should have considered the overlapping if the case was one where the court ought to have considered the overlapping although there was no submission from the opponent (see paras 33–34 & 36).

(6) The award for pain and suffering and loss of amenities and any disabilities could not be granted separately because the pain and suffering for part of the injuries should be considered together and subsequently calculated towards the award granted made by the learned sessions court judge (see para 37).

(7) The expense for future medication and future operation for pain and suffering awarded by the sessions court judge did not show any expenditure or it should be continued by the plaintiff (see para 38).

(8) The decision of the sessions court judge on liability that the first defendant was 100% liablie for the accident was set aside and substituted that he was 80% liable and was 20% contributorily negligent against the plaintiff. The award for RM213,000 as general damages was set aside and substituted with RM131,000 (see para 40).]

Nota-nota

Untuk kes-kes mengenai kemalangan jalan raya, lihat 12 *Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 1258–1500.

Untuk kes-kes mengenai perlanggaran antara motosikal dan motolori treler, lihat 11 *Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 334–339.
Untuk kes-kes mengenai rayuan terhadap award yang dibuat, lihat 6 *Mallal's Digest* (4th Ed, 2007 Reissue) perenggan 328–329.

Kes-kes yang dirujuk

Ahmad Nordin bin Hah Maslan & Anor v Eng Ngak Hua & Ors [1985] 2 MLJ 431, MA (diikut)
Balakrishnan a/l Sinnappan & Anor v Mariammah a/p Ganapragasm dan wakil peribadi Anthonysamy a/l Atputham [2006] 4 MLJ 567; [2006] 5 AMR 43, MT (dirujuk)
Bonner v Fox [2006] All ER (D) 18 (Jun), QBD (dirujuk)
British Railways Board v Herrington [1972] AC 877, HL (dirujuk)
Butterfield v Forrester 11 East 60; 103 ER 926 (1809), KB (dirujuk)
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152, HL (diikut)
Davis v Man 152 ER 588 (dirujuk)
Elliot v Preston [1971] 2 LLLR 328 (dirujuk)
Greenfield v London and North Eastern Railway Co [1945] KB 49, MR (dirujuk)
Hamizan bin Abd Hamid v Wong Kok Keong & Anor [1994] 3 MLJ 630; [1994] 4 CLJ 122, MT (dirujuk)
Haron v Macaulay [1969] 1 MLJ 169, MP (diikut)
Hill-Venning v Beszant [1950] 2 All ER 1151, MR (tidak diikut)
Insurance Commissioner v Joyce (1948) 77 CLR 39, MT (dirujuk)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, MA (dibeza)
Jones v Great Western Railway Co (1930) 144 LT 194, HL (diikut)
Kanan a/l Subramaniam dan satu lagi lwn Aman Syah Abadzyuid [2002] 7 MLJ 561; [2002] 6 CLJ 34, MT (dirujuk)
Kuan Kian Seng v Wong Choon Keh [1995] SGHC 43 (dirujuk)
Kuppusamy v Nithanathan [1990] 2 MLJ 494, MT (diikut)
Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403, MA (dirujuk)
Lee Hock Lai v Yeoh Wha Pein [1999] 5 MLJ 172, MT (dirujuk)
Lewis v Denye [1939] 1 KB 540, MR (dirujuk)
Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286; [1981] CLJ 171, MT (dirujuk)
Lloyde v West Midlands Gas Board [1971] 2 All ER 1240, MR (dirujuk)
MA Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183, MP (dirujuk)
Mahamad bin Mohamad Said & Anor v Perianayagam & Anor [1972] 1 MLJ 67, MP (dirujuk)
Muniyandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor [2003] 3 MLJ 527; [2005] 4 AMR 609, MT (dirujuk)
Nadarajan Muniandy v Ayob Jauhari [2001] 4 CLJ 718, MT (diikut)
Nance v British Columbia Electric Railway Co Ltd [1951] AC 601, PC (dirujuk)

Ng Chi Chiung v Lau Kam Ping [2000] HKC 759 (dirujuk)
Ngooi ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30, MP (diikut)
Nordin bin Haji Abdul Wahab v Mohamed Salleh bin Hassan [1986] 2 MLJ 294, MA (dirujuk)
Phuah Jee Suan v Nila Vasu Pillai [1973] 1 MLJ 186, MR (dirujuk)
Rubaidah bte Dirin (suing as widow of Basia bin Bahari, deceased, on behalf of herself and the dependants of the deceased) v Ahmad bin Ariffin [1997] 1 MLJ 677; [1997] 1 CLJ 447, MR (dirujuk)
Saw Tong Seng v Ong Kim Hoon [1968] 1 MLJ 203, MT (dirujuk)
Seenivasan & Anor v Lim Yew Seng [1961] MLJ 22, MR (diikut)
Shanmugam a/l Gopal v Zinal Abidin bin Nazim & Anor [2003] 3 MLJ 76; (2003) 1 LNS 118, MT (dirujuk)
Suriati bte Takril v Mohan a/l Govindasamy & Anor [2001] 2 MLJ 275; [2001] 2 CLJ 101, MT (dirujuk)
Swadling v Cooper [1931] AC 1, HL (dirujuk)
Tan Cheong Poh & Anor v Teow Ah Keow [1995] 3 MLJ 89, MR (dirujuk)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, MA (diikut)
Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50, MP (diikut)
Topaiwah v Salleh [1968] 1 MLJ 284, MP (diikut)
United Plywood & Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, MP (diikut)
Ward v James [1966] 1 QB 273, MR (diikut)
Watson v Powles [1968] 1 QB 596, MR (diikut)
Wilson v Pilley [1957] 3 All ER 525, MR (dirujuk)
Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor [1985] 2 MLJ 373, MA (dirujuk)
Yasin bin Wahab v Loo Kok Wai [1980] 2 MLJ 43, MT (dirujuk)
Zamri Md Som & Anor v Nurul Fitriyaton Idawiyah Nahrawi [2002] 1 CLJ 309, MT (dirujuk)

Udang-undang yang dirujuk

Akta Keterangan 1950 s 106
Akta Pengangkutan Jalan 1987 s 68(3)
Akta Undang-Undang Sivil 1956 s 12(1)
Kaedah-Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) 1959 k 101A(2)
Kaedah-Kaedah Lalulintas Jalanraya 1959 k 17
Kaedah-Kaedah Mahkamah Rendah 1980
Kanun Lebuhraya k 42

Joseph Au (Omar & Joseph Au) bagi pihak perayu-perayu.
Roziana bt Ibrahim (VP Nathan & Partners) bagi pihak responden.

A

VT Singham JC:

[1] Ini adalah satu rayuan terhadap keputusan hakim mahkamah sesyen
B di mana defendan/perayu didapati 100% cuai di atas kemalangan jalan raya. Dalam kes ini, plaintif/responden (SP4) adalah penunggang motosikal No JDE 5103. Defendan pertama adalah dikatakan meletakkan motorlori No JEF 9421 bersama treler beliau di sebelah kiri jalan menghala ke arah Segamat di mana sebahagian motolori berada di atas jalan raya dan
C sebahagian di atas bahu jalan. Dalam rayuan ini, perayu-perayu dan responden akan dirujuk sebagai defendan-defendan dan plaintif masing-masing.

[2] Dalam kes ini, plaintif menunggang motosikal tersebut dari arah
D Kuantan ke arah Segamat (mengikut rajah kasar (eksh P1 di ms 191 rekod rayuan), iaitu dari bawah ke atas. Mengikut versi plaintif dalam keterangan di mahkamah sesyen, plaintif berkata keadaan cuaca adalah gelap, beliau tidak sedar dan cuaca pula mendung serta kabur, menyebabkan beliau terus melanggar motolori tersebut (rujuk gambar-gambar (eksh P2 A–E)
E di ms 193–194 rekod rayuan). Kemalangan ini berlaku pada 9 Mac 2001 pada jam lebih kurang 6.30 pagi di mana plaintif telah merempuh motolori defendan pertama di mana motolori tersebut adalah di dalam keadaan terletak (berhenti) seperti yang dinyatakan di atas. Mengikut keterangan pegawai penyiasat (SP2), perlanggaran tersebut berlaku di bahagian tayar
F belakang sebelah kanan mototreler. Pegawai penyiasat (SP2) juga berkata, kepala motor treler itu tidak menghalang keseluruhan jalan menghala ke Segamat.

[3] Dalam kes ini, defendan pertama tidak memberi keterangan. Hakim
G mahkamah sesyen yang bijaksana bergantung kepada keterangan pegawai penyiasat (SP2), plaintif (SP4), laporan polis plaintif, laporan polis defendan pertama, rajah kasar (eksh P1) dan gambar-gambar polis (eksh P2 A–E). Hakim mahkamah sesyen yang bijaksana mendapati defendan pertama menanggung 100% liabiliti dalam kemalangan tersebut. Hakim mahkamah
H sesyen yang bijaksana tidak menyatakan dalam keputusan bahawa defendan pertama 100% cuai (rujuk kepada penghakiman yang dimeterai di ms 17–20 rekod rayuan, khususnya, di ms 17), di mana beliau hanya menyatakan liabiliti ditanggung oleh defendan 100% dalam kemalangan ini. Hakim mahkamah sesyen yang bijaksana juga tidak menyatakan liabiliti yang
I ditanggung 100% adalah oleh defendan pertama. Walau bagaimanapun, dalam alasan penghakiman bertarikh 19 Mac 2008 iaitu lebih kurang 11 bulan kemudian, hakim mahkamah sesyen yang bijaksana ada menyatakan defendan pertama sepatutnya dipersalahkan 100% dalam kemalangan ini dan menurutnya, defendan-defendan adalah bertanggungjawab 100%.

Seterusnya, hakim mahkamah sesyen juga mengawardkan RM213,000 untuk ganti rugi am dan RM23,224 sebagai ganti rugi khas kepada plaintif. A

[4] Di sini adalah penting untuk menyatakan bahawa laporan polis yang dibuat oleh plaintif atau laporan polis yang dibuat oleh defendan pertama tidak dikemukakan sebagai keterangan sama ada melalui plaintif atau melalui pegawai penyiasat SP2 atau ditandakan sebagai ekshibit. Malangnya, didapati hakim mahkamah sesyen yang bijaksana telah merujuk kepada laporan polis yang dibuat oleh plaintif dan laporan polis yang dibuat oleh pemandu mototreler tersebut, iaitu, defendan pertama dalam alasan-alasan penghakiman walaupun kedua-dua laporan polis tidak dikemukakan sebagai keterangan dan ditandakan sebagai ekshibit. Juga tiada sebarang catitan dalam nota-nota keterangan mengenai sama ada kedua-dua laporan polis tersebut telah dipersetujui untuk diterima sebagai keterangan. Lebih-lebih lagi dan selanjutnya, didapati kedua-dua laporan polis tersebut tidak dirujuk, sama ada kepada pegawai penyiasat SP2 atau kepada plaintif SP4. Keputusan oleh mahkamah ini dalam rayuan ini dibuat berdasarkan kepada catatan nota-nota keterangan yang terkandung dalam rekod rayuan. Oleh itu, mahkamah perbicaraan tidak boleh mengambilkira kepada kandungan kedua-dua laporan polis di mana khususnya, defendan pertama tidak memberi keterangan dan tidak ada sebarang catitan di nota-nota keterangan oleh mahkamah perbicaraan, sama ada laporan polis tersebut dipersetujui dan diterima sebagai keterangan atau tidak. B C D E

[5] Defendan-defendan tidak berpuas hati terhadap keputusan hakim mahkamah sesyen, di mana defendan pertama didapati 100% bertanggungjawab mengikut alasan-alasan penghakiman terhadap kemalangan dan award ganti rugi am yang dibenarkan dan merayu kepada Mahkamah Tinggi terhadap liabiliti dan kuantum. F G

[6] Terlebih dahulu, mahkamah ini ingin menyatakan bahawa mahkamah ini yang bersidang sebagai mahkamah rayuan sememangnya sedar di mana Mahkamah Rayuan secara am tidak masuk campur di atas pendapat mahkamah perbicaraan, di mana mahkamah perbicaraan mempunyai peluang untuk melihat dan mendengar saksi-saksi memberi keterangan di mana peluang itu tidak terdapat di Mahkamah Rayuan. Walau bagaimanapun, adalah penting untuk menyatakan di sini bahawa rayuan ini adalah satu pendengaran semula (rehearing) di atas nota-nota yang direkodkan dan terkandung dalam rekod rayuan. Oleh yang demikian, soalan yang timbul adalah, sama ada mahkamah ini yang bersidang sebagai mahkamah rayuan patut dan harus masuk campur di atas pendapat mahkamah perbicaraan. Jawapan kepada soalan tersebut adalah bergantung dan berdasarkan kepada fakta, keadaan dan latar belakang sesuatu kes dan bukan semata-mata hadkan kuasa mahkamah ini untuk tidak masuk campur H I

di atas pendapat mahkamah perbicaraan. Pendek kata, mahkamah ini yang bersidang sebagai mahkamah rayuan sememangnya mempunyai kuasa untuk masuk campur sekiranya terdapat sebarang kesilapan atau *misdirection* di atas keputusan mahkamah perbicaraan (rujuk kes *Balakrishnan a/l Sinnappan & Anor v Mariammah a/p Ganapragasm dan dan wakil peribadi Anthonysamy a/l Atputham* [2006] 4 MLJ 567; [2006] 5 AMR 43 dan *Muniyandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor* [2003] 3 MLJ 527; [2005] 4 AMR 609 di ms 623, 636–637), di mana keputusan Mahkamah Persekutuan dan Mahkamah Rayuan telah dirujuk dan diberi pertimbangan dalam kes tersebut. Walau bagaimanapun, mahkamah ini berpendapat bahawa berdasarkan kepada fakta dan latar belakang kes ini, rayuan ini merupakan suatu keadaan, di mana mahkamah ini patut masuk campur di atas pendapat hakim mahkamah sesyen yang bijaksana.

LIABILITI

[7] Dalam kes ini, mahkamah ini berpendapat bahawa hanya terdapat satu isu utama untuk menentukan liabiliti terhadap defendan pertama, iaitu, sama ada terdapat sebarang tanda amaran yang diletak di belakang motolori defendan pertama seperti dikehendaki di bawah Kaedah-Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) 1959, r 101A(2) berkata:

> (1) Every driver of a vehicle as specified in the Second Schedule to these Rules shall carry a reflectorised safety triangle to signify the vehicle's presence when it is stationary on any road (other than a road situated within the area of an appropriate authority) but not at an authorised bus stop or a lay-bye.
>
> (2) The driver of the vehicle shall place the safety triangle at a distance of not less than fifty yards from the rear of the vehicle and in a position from which the safety triangle gives advance warning of the stationary vehicle to vehicles approaching from the rear.
>
> (3) The safety triangle shall be in the form of equilateral triangle with sides not less than sixteen inches long and a red border of not less than two inches wide with a hollow centre.
>
> (4) The red border shall be painted or fitted with a red reflectorised surface and shall be visible from a distance of not less than five hundred yards in the high-beam of headlights of any motor vehicle and shall not lose more than 10 per cent of its reflective power when it is raining.
>
> (5) The triangle shall be constructed that it can be stood firmly in a vertical position on the road.

[8] Plaintif telah menyatakan tidak ada tanda amaran dan keterangan itu adalah disokong oleh pegawai penyiasat (SP2) bahawa semasa SP2 sampai di tempat kejadian selepas kemalangan, beliau tidak nampak apa-apa tanda amaran. Dalam keadaan tersebut dan oleh kerana defendan pertama juga tidak memberi keterangan atau terdapat keterangan sebaliknya atau disangkal, khususnya, terhadap isu tidak ada tanda amaran, mahkamah ini boleh menerima keterangan plaintif bahawa tidak ada tanda amaran diletakkan dibelakang motolori pada masa kemalangan berlaku. Perkara itu adalah dalam pengetahuan defendan pertama sendiri dan defendan pertama sendiri sepatutnya memberi keterangan terhadap isu tersebut sekiranya beliau ingin menyangkal keterangan plaintif bahawa tidak ada tanda amaran diletakkan dibelakang motolori tersebut, seperti yang dikatakan oleh plaintif dan disokong oleh pegawai penyiasat (SP2). Seksyen 68(3) Akta Pengangkutan Jalan 1987 berkata:

> Failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or the negate any liability which is in question in those proceedings.

Dalam kes *Insurance Commissioner v Joyce* (1948) 77 CLR 39, Riche H berkata di ms 49:

> When circumstances as proved indicating a conclusion that the only party who can give direct evidence of the matter prefers the well of the court to the witness box, a court is entitled to be bold (rujuk juga kepada s 106 Akta Keterangan 1950).

[9] Oleh itu, mahkamah perbicaraan boleh dan berhak untuk memutuskan bahawa defendan pertama sebenarnya tidak meletakkan tanda amaran tersebut seperti dikehendaki di bawah r 101A(2) Kaedah-Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) 1959. Dalam kes *British Railways Board v Herrington* [1972] AC 877 defendan tidak memberi keterangan dan Lord Diplock berkata di ms 930:

> This is legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

[10] Dalam kes ini, fakta dan keterangan menunjukkan bahawa plaintif tidak dapat mengelak atau membelok (swerve) ke kanan jalan dalam had penglihatan plaintif (within the limit of his vision). Di atas fakta-fakta kes ini, didapati dan boleh membangkitkan inferens bahawa plaintif telah menunggang motosikal dalam kelajuan yang tidak sepatutnya (unwarranted) dengan penglihatan yang kurang jelas pada masa itu (poor visibility prevailing

at that time) dan tidak mungkin beliau menunggang motosikal dalam kelajuan 30km/j seperti dinyatakan oleh plaintif dan kelajuan 30km/j telah dicabar oleh peguam defendan-defendan semasa pemeriksaan balas bahawa kelajuan motosikal plaintif adalah melebihi dari 30km/j di mana plaintif tidak bersetuju. Dalam keadaan tersebut, mahkamah ini boleh membuat inferens yang berasas bahawa plaintif tidak dapat mengawal motosikal beliau kerana beliau berada dalam keadaan terkejut, menunggang motosikal dengan kelajuan melebihi 30km/j dan ini bermakna plaintif tidak mengambil langkah-langkah yang munasabah untuk mengelakkan sebarang keadaan kecemasan dan kurang berhati-hati apabila berada dalam pergerakan dan tidak mengurangkan kelajuan motosikal supaya beliau dapat mengawal sebarang kecemasan dalam keadaan cuaca yang dihadapi oleh plaintif.

[11] Oleh itu, mahkamah ini tidak bersetuju dengan pendapat hakim mahkamah sesyen bahawa defendan pertama adalah 100% bertanggungjawab kepada kemalangan tersebut. Di atas fakta, keadaan kes ini dan pengakuan plaintif bahawa penglihatan beliau adalah kurang jelas kerana pada masa itu adalah gelap dan cuaca mendung serta kabur, mahkamah ini berpendapat bahawa plaintif mempunyai peluang untuk mengelakkan kemalangan tersebut sekiranya plaintif ada mengambil langkah-langkah yang munasabah, lebih berhati-hati dan kurangkan kelajuan beliau supaya dapat mengawal motosikal dan mengelakkan kemalangan tersebut. Dalam keadaan tersebut dan di atas alasan tersebut sahaja, mahkamah ini berpendapat bahawa plaintif telah menyumbang kepada kemalangan tersebut dan sepatutnya didapati lebih bertanggungjawab kerana beliau adalah dalam pergerakan. Mahkamah ini juga mempunyai budi bicara untuk membahagikan ganti rugi apabila didapati plaintif juga telah menyumbang kepada kecederaan beliau seperti diperuntukkan di bawah s 12(1) Akta Undang-Undang Sivil 1956. Section 12(1) Akta Undang-Undang Sivil 1956 berkata:

> Section 12(1) of the Civil Law Act 1956 is merely a provision of substantive law that gives power and jurisdiction to the Court to reduce the damages proportionate to any contributory negligence on the part of the person who suffers damage as a result partly of his own fault and partly of the fault of any other person or persons.

[12] Mahkamah ini mempunyai budi bicara untuk bergantung di atas inferen berdasarkan kepada fakta dan keadaan sesuatu kes. Dalam rayuan ini, berdasarkan kepada keterangan plaintif sendiri, mahkamah perbicaraan bebas untuk menentukan, sama ada plaintif juga telah menyumbang kepada kemalangan walaupun defendan pertama tidak memberi keterangan dalam perbicaraan dan mahkamah perbicaraan boleh dan bebas bergantung kepada inferen yang boleh didapati daripada keterangan plaintif sendiri.

Dalam kes *Jones v Great Western Railway Co* (1930) 144 LT 194 Lord Macmillan berkata di ms 202: A

> An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of proof.

B

Mahkamah ini juga ingin merujuk kepada kes *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 di mana Lord Wright berkata di ms 186–170:

> Inference must be carefully distinguished from conjecture or speculation. There C can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of D inference fails and what is left is mere speculation or conjecture.

[13] Dalam kes di hadapan mahkamah ini, terdapat fakta yang objektif, di mana plaintif sendiri telah mengakui bahawa keadaan adalah gelap, cuaca mendung dan kabur. Dengan itu, mahkamah boleh membuat inferen bahawa E penglihatan (visibility) di arah hadapan adalah tidak jelas dan selamat untuk plaintif meneruskan perjalanan beliau tanpa mengambil langkah-langkah yang munasabah dan lebih berhati-hati. Seterusnya dan sepatutnya seorang penunggang seperti dalam keadaan plaintif harus menunggang dengan lebih berhati-hati supaya dapat mengawal apa-apa atau sebarang keadaan F kecemasan atau yang tidak diingini berlaku atau yang akan dihadapi dari arah hadapan beliau. Apa lagi di mana plaintif sendiri mengakui keadaan cuaca adalah gelap dan beliau 'terus tidak sedar' dan juga tidak nampak motolori yang besar seperti motolori defendan pertama di hadapannya yang terletak bersama trelernya di satu jalan yang lurus. G

[14] Oleh itu, adalah tugas dan tanggungjawab plaintif untuk menunggang motosikal dalam kelajuan dan kawalan yang lebih berhati-hati di atas jalan raya di mana plaintif adalah dalam pergerakan supaya plaintif dapat mengelakkan sebarang kecemasan atau *exigencies* yang tiba-tiba mungkin H timbul di hadapannya. Seterusnya, plaintif patut dan harus menyangka apa-apa yang tidak diingini yang mungkin akan berlaku kerana penglihatan di hadapan adalah tidak memuaskan dan mungkin adalah satu keadaan merbahaya kepada kenderaan lalu lintas termasuk plaintif yang ada dalam pergerakan dan bukan meneruskan perjalanan tanpa mengambil I langkah-langkah yang munasabah dalam keadaan tersebut. Di atas pengakuan plaintif sendiri di mana cuaca pada masa itu tidak selamat, gelap dan kabur iaitu pada jam lebih kurang 6.30 pagi dan sekiranya plaintif ada mengambil langkah-langkah yang mencukupi dan lebih berhati-hati, ada

kemungkinan kemalangan ini dapat dielakkan dan beliau tidak menghadapi kejadian seperti yang berlaku dalam kes ini.

[15] Di sini adalah penting untuk mengambilkira bahawa kenderaan defendan pertama adalah satu kenderaan yang besar dan bersambung dengan satu treler besar. Oleh itu, adalah mustahil untuk plaintif tidak dapat melihat motolori tersebut dalam jarak jauh yang munasabah di mana jalan itu adalah lurus dan mengawal motosikal beliau untuk mengelakkan sebarang kemalangan, sekiranya plaintif menunggang motosikal dalam kelajuan yang munasabah dalam keadaan cuaca tersebut dan lebih berhati-hati. Sekiranya plaintif ada berbuat sedemikian, adalah berkemungkinan besar kemalangan dapat dielakkan dan tidak akan berlaku seperti yang dikatakan oleh plaintif. Mahkamah ini tidak dapat menerima keterangan plaintif bahawa kelajuan motosikal pada masa itu adalah 30km/j kerana kelajuan tersebut mungkin boleh dan akan memberi peluang untuk mengawal motosikal beliau dalam keadaan tersebut, sekiranya plaintif menunggang dengan lebih berhati-hati dan lebih bertanggungjawab, kemalangan tersebut tidak akan berlaku bagaimana dan seperti yang dikatakan oleh plaintif. Dalam kes ini tidak boleh dinafikan bahawa beban pembuktian (legal burden of proof) adalah tanggungjawab plaintif tetapi keterangan pembuktian (evidential burden) adalah terletak kepada defendan di mana s 106 Akta Keterangan 1950 berkata:

> Apabila mana-mana fakta diketahui secara khusus oleh mana-mana orang, maka beban membuktikan fakta itu terletak padanya.

> A distinction is drawn between the 'legal burden' of proof which always rests on the plaintiff (or defendant in a cross-suit) and a provisional burden. The former is imposed by the law itself; the latter is a burden which is created by the state of the evidence. A piece of evidence may raise a 'presumption' or a 'prima facie' case in the sense that if nothing more is proved the court may (but not necessarily must) infer that there was negligence and may call upon the other party to answer that piece of evidence. But it is only a provisional burden which may be answered by evidence or by argument. It is not a compelling presumption; it is only a provisional one which may shift from one party to the other and back again as the case proceeds (see *Brown v Rolls Royce Ltd* [1960] 1 WLR 210).

[16] Walau bagaimanapun, dan oleh kerana defendan pertama tidak memberi keterangan, ini bukan bermakna bahawa defendan pertama semata-mata patut didapati 100% cuai melainkan terdapat keterangan bahawa defendan pertama ada cuai seperti dalam kes ini di mana didapati dan tanpa keterangan sangkal bahawa defendan pertama tidak meletakkan tanda amaran di belakang motolori tersebut. Dalam keadaan tersebut, mahkamah perbicaraan masih mempunyai tugas untuk menilai keterangan keseluruhan, (there must be proper judicial evaluation) secara kehakiman sama ada, pertama, defendan pertama cuai dan bertanggungjawab terhadap kemalangan

tersebut dan kedua, dan sekiranya defendan pertama didapati cuai, sama ada plaintif juga telah menyumbang kepada kemalangan tersebut. A

Dalam kes *Lee Hock Lai v Yeoh Wha Pein* [1999] 5 MLJ 172, Mohd Hishamudin H (sekarang HMR) berkata di ms 175: B

> With respect, the learned sessions court judge was fundamentally wrong in the approach. The case she was dealing with — a normal road accident case — essentially concerns the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case — among which was whether there was a breach of a legal duty to take care by the defendant) as to whether or not the defendant was liable in negligence. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence that would be the end of the matter! But if, on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, has pleaded contributory negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of contributory negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage (rujuk kes *Lee Hock Lai v Yeoh Wha Pein* [1999] 5 MLJ 172). C D E F

[17] Berdasarkan keterangan plaintif sendiri, mahkamah perbicaraan juga sepatutnya membangkitkan soalan, sama ada plaintif ada menyumbang kepada kemalangan dan apakah langkah-langkah yang telah diambil oleh plaintif untuk mengelakkan kemalangan dalam keadaan di mana cuaca yang dihadapi oleh plaintif adalah tidak memuaskan dan tidak selamat di atas pengakuan plaintif sendiri di mana penglihatan di hadapan adalah tidak memuaskan. Di atas fakta dan pengakuan oleh plaintif sendiri, dengan segala hormatnya, hakim mahkamah sesyen yang bijaksana sepatutnya mendapati plaintif ada menyumbang kepada kemalangan tersebut. Dalam kes ini, dengan segala hormatnya, didapati hakim mahkamah sesyen yang bijaksana tidak menjalankan tugasnya dan menilai keterangan secara kehakiman (there is no proper judicial evaluation) dan sebab itu hakim mahkamah sesyen yang bijaksana gagal untuk mengambilkira keterangan plaintif terhadap keadaan cuaca dan ini adalah satu *non-direction* di mana adalah *misdirection*, di mana telah memberi kesan kepada pendapat hakim mahkamah sesyen terhadap liabiliti dan pendapat tersebut tidak dapat dikekalkan kerana mahkamah ini mendapati tidak ada penilaian keterangan keseluruhan dan secara G H I

kehakiman. Dalam kes *Suriati bte Takril v Mohan a/l Govindasamy & Anor* [2001] 2 MLJ 275; [2001] 2 CLJ 101, Abdul Malik Ishak H (pada masa itu) (sekarang HMR) berkata:

> At the end of the day, an appeal being a rehearing, the appellate court would generally be in a good position as the trial judge to evaluate the available evidence in printed form and the appellate court must not shrink from its responsibility in undertaking that onerous task although the appellate court ought to give some weight to the trial judge's opinion. It is salutary to remember that there cannot be any presumption that the judgment of the trial judge was right, such a presumption if it ever exists should be buried and remain buried forever in the abyss of darkness.

Dalam kes *Rubaidah bte Dirin (suing as widow of Basia bin Bahari, deceased, on behalf of herself and the dependants of the deceased) v Ahmad bin Ariffin* [1997] 1 MLJ 677; [1997] 1 CLJ 447, Mahkamah Rayuan berkata di ms 462:

> The duty of the court is to apply the law as it finds it and not to create judicial foundations for a welfare state. We do not think our legislation was ever intended to produce a windfall for dependents of deceased persons who were substantially the authors of their own misfortune.

[18] Seterusnya, mahkamah ini berpendapat doktrin res ipsa loquitor tidak digunapakai dalam fakta dan keadaan kes ini. Mahkamah ini berpendapat bahawa doktrin res ipsa loquitur seperti diplidkan oleh plaintif di perenggan 7 pernyataan tuntutan tidak terpakai di atas fakta dan keadaan kes ini kerana plaintif mengetahui bagaimana kemalangan berlaku dan apakah punca yang menyebabkan kemalangan. Bagaimana kemalangan berlaku juga adalah dalam pengetahuan plaintif sendiri seperti yang diakui oleh plaintif (rujuk kes *Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor* [1985] 2 MLJ 373 di ms 375; *MA Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183 dan *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240 di ms 1246). Oleh yang demikian, mahkamah perbicaraan harus memutuskan terdapat sumbangan kecuaian oleh plaintif.

[19] Seperti yang dikatakan lebih awal, tidak boleh dinafikan bahawa tidak terdapat tanda amaran seperti dikehendaki dari segi undang-undang di belakang motolori dan defendan pertama adalah bertanggungjawab kerana gagal mematuhi peruntukan tersebut ataupun menyangkal keterangan plaintif yang juga disokong oleh pegawai penyiasat (SP2) mengenai perkara tersebut. Oleh itu, defendan pertama perlu bersedia untuk menerima keterangan plaintif dan risiko untuk tidak menyangkal keterangan mengenai tanda amaran di mana mahkamah perbicaraan juga perlu menerima keterangan plaintif di atas isu tidak ada tanda amaran (rujuk kes *Jaafar bin*

Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 di ms 704).

[20] Di atas fakta dan keadaan kes ini, isu bagaimana kemalangan berlaku, mahkamah boleh mengambilkira keterangan plaintif dan pengakuan plaintif, iaitu, keadaan penglihatan (visibility) pada masa material itu adalah gelap dan kabur, plaintif harus dan patut menunggang motosikal dengan lebih berhati-hati dan bertanggungjawab serta menunggang motosikal beliau dalam keadaan di mana beliau dapat mengawal motosikal dan mengelakkan sebarang kejadian yang tidak diingini berlaku apabila dan sekiranya timbul apa-apa situasi kecemasan atau *exigencies* di hadapannya. Tidak boleh dinafikan bahawa struktur jalan di mana kemalangan berlaku merupakan satu jalan yang lurus, tidak ada keterangan dan tidak boleh dikatakan meletakkan motolori defendan telah menghalang sepenuhnya keseluruhan lalu lintas termasuk laluan plaintif dan ini disahkan oleh pegawai penyiasat (SP2). Mengikut rajah kasar (eksh P1) dan gambar-gambar tempat kemalangan (eksh P2 A–E) dan keterangan pegawai penyiasat (SP2), jalan tersebut adalah lurus dan mahkamah ini berpendapat ada ruang yang mencukupi untuk motosikal yang ditunggang oleh plaintif melepasi motolori defendan pertama yang diletak di sebelah kiri jalan dan sebahagian di atas jalan raya dan sebahagian bahu jalan di tepi jalan. Di atas keadaan tersebut, plaintif ada peluang dan mungkin boleh mengelakkan pelanggaran di belakang motolori dari arah belakang sekiranya plaintif menunggang motosikal dengan lebih berhati-hati, kurangkan kelajuan motosikal sebaik sahaja beliau sedar adalah sukar untuk melihat di hadapan dan penglihatan (visibility) dihadapan adalah gelap dan kabur mengikut pengakuan plaintif sendiri. Oleh yang demikian, ada kemungkinan kemalangan boleh dielakkan kerana terdapat ruang yang mencukupi di sebelah kanan motolori untuk plaintif meneruskan perjalanan beliau dan melepasi motolori tanpa apa-apa kejadian di mana didapati disumbang oleh plaintif sendiri. Dalam kes *Haron v Macaulay* [1969] 1 MLJ 169 di ms 170, Mahkamah Persekutuan berkata:

> It is clear however that the accident happened because the respondent was unable to draw up or swerve his car to the right side of the road within the limit of his vision, which is indicative of the fact that he must have driven at a speed unwarranted by the poor visibility prevailing at that time. We, therefore, agree with the finding of the learned trial judge that the respondent was guilty of contributory negligence and the proportion of the negligence was one-third as against the appellant's share of two-thirds.

Dalam kes *Butterfield v Forrester* 11 East 60; 103 ER 926 (1809), defendan telah membina satu halangan di atas jalan raya (erected an obstruction on highway). Plaintif yang menunggang motosikal telah melanggar dan mengalami kecederaan. Bailey H berkata:

If a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the defendant (rujuk kes *Davis v Man* 152 ER 588).

Dalam kes *Bonner v Fox* [2006] All ER (D) 18 (Jun), QBD, fakta kes adalah seperti berikut dan adalah dalam bahasa Inggeris:

The defendant was travelling along an unlit section of motorway at night. On his account, he swerved to avoid an animal in the road. He lost control of his car, and it collided with the central reservation before spinning across the carriageway. The car came to rest mostly in the nearside lane, but protruding into the fast lane. It was some 400 yards beyond the brow of a hill. The defendant was not seriously injured but was shaken up, and remained seated in his car. An articulated lorry then came upon the scene driven by H. H parked his lorry on the hard shoulder some distance beyond the defendant's car. He gave evidence that he had put his hazard lights on. Other witnesses gave evidence that the lorry was only showing its sidelights. H helped the defendant out of his car and took him up onto a bank behind the hard shoulder some 100 yards beyond the car. The evidence suggested that the defendant had left both his driving and hazard lights on when he left the car, but that these had faded or gone out. A number of vehicles subsequently passed the defendant's car without incident. The claimant was also driving a lorry. He came over the brow of the hill, but did not see the defendant's car until he was quite close. He swerved to the nearside to avoid the defendant's car, and collided with the rear of H's lorry. He suffered serious injury. The claimant issued proceedings and a trial took place to determine outstanding issues of liability.

Dalam kes *Bonner v Fox*, mahkamah perbicaraan mendapati penuntut adalah 50% menyumbang kepada kecuaian kerana beliau gagal untuk melihat kenderaan defendan dalam masa yang mencukupi. Di sini adalah penting untuk menyatakan dan membezakan fakta kes di hadapan mahkamah ini dan fakta kes di *Bonner v Fox* di mana dalam kes *Bonner v Fox*, tidak ada sebarang gangguan kepada penglihatan plaintif dalam kes tersebut seperti dalam kes di hadapan mahkamah ini, namun demikian, mahkamah masih mendapati penuntut adalah 50% menyumbang kepada kemalangan manakala fakta kes dalam kes di hadapan mahkamah ini menunjukkan keadaan cuaca menerusi penglihatan di hadapan adalah gelap serta kabur di mana fakta ini diakui oleh plaintif sendiri.

[21] Isu sama ada mahkamah perbicaraan sepatutnya mengambilkira keterangan plaintif di mana terdapat pengakuan plaintif sendiri bahawa penglihatan di hadapan adalah gelap dan kabur, mahkamah ini berpendapat bahawa mahkamah perbicaraan boleh dan sepatutnya mengambilkira keseluruhan keterangan yang dikemukakan di hadapan mahkamah tersebut termasuk keadaan seperti yang dikatakan oleh plaintif telah menyumbang kepada kemalangan. Walaupun defendan pertama tidak memberi keterangan atau menyangkal keterangan plaintif bahawa tidak ada tanda amaran,

di mana defendan pertama hanya perlu menyangkal terhadap isu tidak ada tanda amaran, mahkamah perbicaraan masih boleh dan harus mengambilkira terutamanya terhadap keadaan cuaca pada masa tersebut dan apakah langkah-langkah atau tindakan yang telah diambil oleh plaintif untuk lebih berhati-hati dalam keadaan tersebut kerana bagaimana kemalangan berlaku, keadaan cuaca pada masa itu dan arah perjalanan plaintif dan kedudukan motolori defendan pertama seperti yang dinyatakan oleh pegawai penyiasat SP2 tidak dipertikaikan oleh mana-mana pihak. Oleh itu, kegagalan defendan pertama memberi keterangan tidak semestinya boleh menyebabkan defendan pertama semata-mata 100% cuai tanpa mengambilkira fakta dan keadaan kes ini, sama ada plaintif telah menyumbang kepada kemalangan tersebut. Dengan itu, mahkamah ini berpendapat dengan segala hormatnya, bahawa fakta kes dalam *Jaafar bin Shaari* harus dibezakan walaupun prinsip yang disebut oleh Mahkamah Persekutuan dalam kes tersebut mengikat mahkamah ini dan harus diikuti.

[22] Dengan segala hormatnya, mahkamah ini memang tidak menghargai hujah-hujah peguam plaintif bahawa tanpa keterangan *rebuttal* daripada defendan pertama, mahkamah tidak boleh mengambilkira atau sebarang sumbangan oleh plaintif. Hujahan peguam plaintif tersebut di atas fakta dan keadaan kes ini, dengan segala hormatnya, adalah tidak berasas dari segi fakta atau undang-undang. Di sini adalah penting untuk menyatakan bahawa tugas mahkamah perbicaraan adalah untuk menilai keterangan secara keseluruhan dan secara kehakiman dan tidak kira sama ada defendan pertama telah memberi keterangan atau tidak untuk memutuskan kecuaian terhadap defendan pertama dan pada masa yang sama untuk memutuskan, sama ada terdapat keterangan bahawa plaintif juga telah menyumbang kepada kemalangan di atas keterangan plaintif sendiri dan tidak semestinya berharap atau mencari keterangan defendan pertama.

[23] Dalam kes ini, adalah jelas plaintif telah memberi keterangan mengenai kedudukan cuaca pada masa itu, iaitu, adalah gelap dan kabur dan mahkamah perbicaraan sepatutnya wajib untuk meneliti dan menilai keterangan plaintif dan membuat keputusan, sama ada plaintif juga telah menyumbang kepada kemalangan di mana plaintif telah melanggar motolori defendan pertama yang telah diletak atau berhenti dari arah belakang, di mana tidak boleh dinafikan bahawa sebahagian badan motolori tersebut diletakkan di atas jalan raya tetapi tidak menghalang laluan sepenuhnya bagi kenderaan yang datang dari arah belakang di mana dapat melepasi atau lalu di atas jalan tersebut. Dalam kes ini, plaintif adalah dalam keadaan bergerak dan beliau mempunyai lebih tanggungjawab dan juga mempunyai peluang untuk mengelak ke kanan dan berikutnya, kemungkinan kemalangan dapat dielakkan. Mahkamah ini juga ingin merujuk kepada k 17 Kaedah-Kaedah Lalulintas Jalanraya 1959. Kaedah 17 berkata:

17 *Driver to have proper control of vehicle*. No driver while actually driving a vehicle shall be in such a position that *he cannot have proper control over the vehicle or that he cannot retain a full view of the road and traffic ahead* or that he cannot by means of hand signals or direction indicators give signals to traffic to the rear of the vehicle. (Penekanan ditambah.)

[24] Oleh yang demikian dan di atas fakta dan keadaan kes ini pada keseluruhannya dan setelah mengambilkira apakah undang-undang dan meneliti autoriti-autoriti, mahkamah ini berpendapat bahawa hakim mahkamah sesyen yang bijaksana sepatutnya mendapati plaintif turut menyumbang kepada kemalangan. Keterangan plaintif sendiri adalah jelas bagaimana kemalangan berlaku dan perkara itu tidak dinafikan oleh defendan pertama dan versi plaintif bagaimana kemalangan berlaku tidak dicabar melainkan defendan pertama ingin mencabar keterangan plaintif dan menyangkal bahawa terdapat tanda amaran diletak jauh di belakang motolori di atas jalan raya.

Dalam kes *Kuppusamy v Nithanathan* [1990] 2 MLJ 494, plaintif dan defendan tidak memberi keterangan bagaimana kemalangan berlaku dan sepatutnya tuntutan plaitif harus ditolak. Bagaimanapun, Mahkamah Tinggi membenarkan tuntutan plaintif dan membahagikan liabiliti sama rata 50:50 diantara plaintif dan defendan yang tidak memberi keterangan setelah menilai keterangan yang diberikan oleh pegawai penyiasat dan dokumen-dokumen yang dikemukakan bagi pihak plaintif.

Dalam kes *Nadarajan Muniandy v Ayob Jauhari* [2001] 4 CLJ 718, defendan tidak memberi keterangan. Mahkamah Tinggi berkata, bahawa dan oleh kerana defendan tidak memberi keterangan, ia bukan bermakna mahkamah tidak boleh mendapati sama ada plaintif telah menyumbang kepada kemalangan dan mendapati sumbangan kecuaian di mana boleh didapati daripada keterangan plaintif sendiri.

Dalam kes *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, Lord Simon berkata:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … *that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full* (Rujuk kes *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403 di ms 404). (Penekanan ditambah.)

Bagi kecuaian sertaan terhadap plaintif, mahkamah ini berpendapat bahawa ia disebabkan oleh kelajuan plaintif pada masa itu, sekiranya plaintif telah mengurangkan kelajuan dan lebih berhati-hati, tindakan untuk mengelakkan patut dipertimbangkan dan berada dalam fikiran serta diambil kira untuk mengelakkan kemalangan tersebut.

Dalam kes *Hamizan bin Abd Hamid lwn Wong Kok Keong & Ors* [1994] 3 MLJ 630; [1994] 4 CLJ 122, mahkamah berkata:

> The doctrine of contributory negligence cannot be based upon a breach of duty to the negligent defendant.

Dalam kes *Lewis v Denye* [1939] 1 KB 540, mahkamah berkata:

> In order to succeed the plaintiff must establish that the defendant was negligent and that negligence caused the collision of which he complains. *If it is established from his own evidence, or by evidence* adduced on behalf of the defendant, *that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails because his injury is due to his own negligence in failing to take reasonable care* (rujuk kes *Swadling v Cooper* [1931] AC 1).

Dalam kes *Hill-Venning v Beszant* [1950] 2 All ER 1151, fakta kes adalah seperti dalam bahasa asal iaitu:

> The defendant motor cyclist had to stop on the highway because the lighting system of his motorcycle failed. He parked it on his side of the road covering about three feet. He did not move the vehicle to the grass verge, but tried to change the bulb of the head lamp thinking that it would take a short while. On finding that the fault was with the wiring, he started to repair it when the plaintiff motorcyclist approached from the rear with lights dipped. He failed to observe the defendant's stationary motorcycle and collided with it. It was not disputed that the plaintiff had been negligent. In the court of first instance on the question whether the defendant was also guilty of negligence, Parker J held that he did not contribute to any negligence at all. On appeal, it was held that the defendant by failing to remove his motorcycle off the highway had not taken all reasonable precautions to prevent danger to other traffic. He was found to be also negligent and apportionment of two-thirds negligence to the plaintiff and one-third to the defendant was made.

[25] Manakala dalam rayuan di hadapan mahkamah ini, fakta dan keadaan adalah lebih sesuai untuk mendapati plaintif telah menyumbang kepada kemalangan kerana plaintif ada memberi keterangan dan mengakui bahawa cuaca adalah tidak selamat di mana adalah gelap dan kabur di hadapan melainkan isu tidak ada tanda amaran diletak di belakang motolori di mana perlu disangkal. Di atas isu itu sahaja, defendan didapati cuai tetapi plaintif adalah lebih bertanggungjawab kerana plaintif adalah dalam pergerakan berbanding kecuaian defendan di mana beliau meletakkan motolori di sebahagian jalan tanpa tanda amaran. Oleh kerana tidak ada keterangan

untuk menyangkal keterangan plaintif dan disokong oleh pegawai penyiasat bahawa tidak ada tanda amaran diletakkan di belakang motolori seperti dikehendaki di bawah k 101A(2) Kaedah-Kaedah Kenderaan Motor (Pembinaan dan Penggunaan) 1959. Mahkamah perbicaraan bebas untuk mendapati bahawa defendan tidak meletakkan tanda amaran tersebut kerana perkara itu tidak disangkal oleh defendan.

[26] Mahkamah ini berpendapat bahawa hakim mahkamah sesyen yang bijaksana, dengan segala hormatnya, telah khilaf apabila beliau mendapati bahawa:

(1) SP2 mengesahkan motosikal ini tersepit di bahagian tayar belakang motolori tersebut dan beliau terpaksa menarik keluar motosikal tersebut daripada bahagian belakang tayar tersebut.

(2) Merujuk kepada dua laporan polis dalam alasan-alasan penghakiman di mana tidak dikemukakan atau ditanda sebagai keterangan ataupun terdapat sebarang persetujuan di peringkat mahkamah perbicaraan.

(3) Oleh itu, mahkamah ini mendapati hakim mahkamah sesyen yang bijaksana telah memberi pertimbangan kepada keterangan yang tidak dikemukakan di hadapan mahkamah perbicaraan seperti yang didapati di dalam rekod rayuan dan telah mengambilkira keterangan ekstrinsik atau di luar keterangan yang dikemukakan.

[27] Seterusnya, mahkamah ini juga berpendapat bahawa k 17 Kaedah-Kaedah Lalulintas Jalanraya 1959 adalah lebih sesuai untuk dipakai kerana pertama, tidak ada keterangan bahawa motolori tersebut telah ditinggalkan sejak malam hari, kedua, kemalangan ini berlaku pada jam 6.30 pagi dan bukan pada waktu malam, ketiga, tidak ada keterangan bahawa motolori defendan pertama diletakkan di tempat kemalangan kerana lampu motolori tidak diletakkan lampu kecemasan atau gagal berfungsi mengikut k 42 Kanun Lebuhraya.

[28] Mahkamah ini juga berpendapat bahawa kes *Hill-Venning v Beszant* [1950] 2 All ER 1151 yang dirujuk oleh hakim mahkamah sesyen yang bijaksana dalam alasan-alasan penghakiman tidak dipakai di atas fakta dan keadaan kes di hadapan mahkamah ini kerana pertama, motolori defendan tidak menghalang mana-mana kenderaan lain untuk melepasi laluan di antara A dan B dan kedua, tidak ada keterangan bahawa tempat kemalangan adalah satu '*fast motor road*' dan adalah berbahaya untuk lalulintas, ketiga, dalam kes di hadapan mahkamah ini, kemalangan berlaku pada jam 6.30 pagi dan bukan pada waktu malam dan tidak ada keterangan ia berlaku di lebuhraya (fast motor road).

[29] Mahkamah ini juga mendapati bahawa mengikut ukuran yang dicatit pada kunci rajah kasar di tempat kemalangan A ke B adalah 2.10 meter (6.89 kaki) iaitu laluan plaintif dan C ke D adalah 7.20 meter (23.61 kaki) untuk kenderaan yang datang dari arah yang bertentangan. Ini bermakna bahawa walaupun kepala motolori terkeluar sebanyak 3.4 kaki, masih ada baki ruang sebanyak 3.49 kaki di antara A ke B untuk plaintif meneruskan perjalanan dan plaintif juga ada ruang di antara A ke D untuk memotong motolori tersebut supaya plaintif dapat meneruskan perjalan di mana tidak ada keterangan bahawa pada masa itu, terdapat sebarang kenderaan yang datang dari arah bertentangan, iaitu dari atas ke bawah di antara A ke D. Mahkamah ini berpendapat bahawa tindakan dan langkah-langkah seperti ini hanya boleh dilakukan sekiranya plaintif ada menunggang motosikal dengan lebih berhati-hati, memberi perhatian ke arah hadapan, kurangkan kelajuan dan lebih bertanggungjawab kepada diri beliau dan kepada pengguna-pengguna lain di jalanraya tersebut. Oleh itu, plaintif tidak boleh menyalahkan defendan pertama sepenuhnya bagi kemalangan tersebut. Seterusnya, hakim mahkamah sesyen yang bijaksana terkhilaf dari segi fakta dan undang-undang apabila beliau gagal mengambilkira perkara-perkara tersebut dan cuaca pada masa itu adalah tidak selamat untuk plaintif meneruskan perjalanan tanpa mengambil langkah-langkah yang mencukupi dan lebih berhati-hati untuk mengelak sekiranya terdapat apa-apa situasi kecemasan yang dihadapi oleh plaintif.

[30] Di atas keseluruhan keterangan dalam kes ini, termasuk keadaan cuaca dan bagaimana kemalangan berlaku, di mana beliau yang datang daripada arah belakang motolori di atas jalan yang lurus dan di mana keadaan penglihatan (visibility) adalah gelap dan kabur, mahkamah ini berpendapat bahawa plaintif tidak boleh mengelakkan tanggungjawab beliau sendiri dan beliau juga ada menyumbang kepada kemalangan tersebut. Plaintif sebagai seorang *motorist* di atas jalan raya dan di atas keadaan cuaca tersebut patut memastikan dan beliau bersedia untuk menghadapi sebarang kecemasan atau *exigencies* di hadapan dan menunggang motosikal dalam kawalan supaya sebarang situasi kecemasan atau *exigencies* dapat dielakkan. Mahkamah ini berpendapat bahawa plaintif gagal untuk mengambil langkah-langkah yang mencukupi dan munasabah untuk mengelakkan kemalangan. Dengan itu, plaintif telah menyumbang seperti dinyatakan lebih awal dan di mana plaintif mempunyai lebih tanggungjawab kerana plaintif adalah dalam keadaan bergerak di atas jalan raya dan cuaca tidak membenarkannya untuk berjalan secara biasa berbanding dengan tanggungjawab defendan.

Kes *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 di ms 704 yang dirujuk oleh peguam plaintif sebenarnya, di atas fakta dan keadaan membantu defendan pertama kerana mahkamah perbicaraan patut mengambilkira keseluruhan keterangan plaintif dan bukan memilih

keterangan yang bertentangan dengan defendan pertama dan tidak mengambilkira keterangan dan juga bertentangan dengan plaintif. Mahkamah perbicaraan harus menerima keterangan plaintif yang tidak disangkal oleh defendan pertama khususnya dan kecuali ada sebarang keterangan menyangkal keterangan terhadap isu bahawa tidak ada tanda amaran dan bukan membuat inferens terhadap defendan pertama di atas keseluruhan keterangan di mana tidak ada pertikaian terhadap bagaimana kemalangan berlaku di mana plaintif sendiri telah mengakui dan menjelaskan kecuali isu tidak ada tanda amaran di belakang motolori defendan.

[31] Oleh itu, kes *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 di ms 704 tidak boleh digunakan semata-mata tanpa membezakan fakta dan keadaan kes itu apabila dibandingkan dengan fakta dan keadaan kes di hadapan mahkamah ini walaupun mahkamah ini terikat dengan prinsip yang diputuskan oleh Mahkamah Persekutuan. Walau bagaimanapun, mahkamah ini mesti dan harus mengambil perhatian terhadap prinsip dalam kes *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 di ms 704 dan dalam keadaan apakah prinsip tersebut terpakai dan bukan semata-mata merujuk kepada kes *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 di ms 704 tanpa merujuk kepada fakta dan keadaan kes itu dan seolah-olah dan seperti dihujahkan oleh peguam bagi plaintif pakai prinsip tersebut bertentangan dengan defendan di mana fakta dan keadaan dalam kes di hadapan mahkamah ini, adalah berlainan dan harus dibezakan. Di sini adalah penting untuk menyatakan bahawa prinsip yang dinyatakan dalam kes *Jaafar Shaari* tidak menyatakan bahawa mahkamah perbicaraan tidak boleh membuat atau mendapati sama ada plaintif telah menyumbang kepada kemalangan tersebut sekiranya terdapat keterangan atau pengakuan dalam keterangan plaintif sendiri seperti dalam kes di hadapan mahkamah ini di mana defendan tidak memberi keterangan.

Dalam kes *Swadling v Cooper* [1931] AC 1, Lord Hailsham di ms 260 berkata:

> To succeed in a running-down case the plaintiff must establish that the defendant was negligent and that that negligence caused the collision of which he complains. If it is established that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails because his injury is due to his own negligence in failing to take reasonable care.

Dalam kes *Ahmad Nordin bin Hah Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 431, Mahkamah Agung berkata di ms 435:

The failure to take sufficient precaution by not leaving any warning light at the rear was the only duty which he had failed to do at the material time. On the other hand, the first respondent's failure to take sufficient lookout in order to avoid an accident happened while he was in charge of a moving vehicle carrying passengers. It is our considered judgment that in the circumstances he has a higher duty to take care than that is required of a driver of a stationary lorry blocking part of the highway (rujuk kes *Ahmad Nordin bin Hah Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 435).

For the reason we are of the considered judgement that the first respondent motocar driver should be more to blame for negligence than the first appellant. We apportion the liability to 70–30, ie 70% on the part of the first respondent and 30% on the part of the first appellant.

[32] Oleh yang demikian, mahkamah ini berpendapat bahawa plaintif harus didapati telah menyumbang kepada kemalangan tersebut di atas asas-asas yang dinyatakan terlebih dahulu walaupun defendan pertama tidak memberi keterangan. Mahkamah ini berpendapat bahawa plaintif harus didapati sekurang-kurangnya 50% menyumbang kecuaian kepada kemalangan tersebut seperti dihujah oleh peguam defendan-defendan di mahkamah sesyen. Walau bagaimanapun, di atas persetujuan peguam bagi defendan terlebih awal dan pada masa hujahan di hadapan mahkamah ini, mahkamah ini bersetuju dan menerima bahawa plaintif didapati 20% menyumbang kecuaian dan defendan 80% cuai.

KUANTUM

[33] Rayuan terhadap kuantum, mahkamah ini berpendapat award yang diberikan oleh hakim mahkamah sesyen untuk ganti rugi am adalah melampau dan tidak mengikut trend dan terkhilaf di atas prinsip bagaimana award harus diberi apabila plaintif mengalami beberapa jenis kecederaan. Hakim mahkamah sesyen yang bijaksana telah mengawardkan sebanyak RM213,000 sebagai ganti rugi am.

Dalam kes *Yasin bin Wahab v Loo Kok Wai* [1980] 2 MLJ 43, Mohamed Azmi H (pada masa itu) di ms 45, berkata:

Adding the assessment of all these five injuries together, a total sum of $25,000 is obtained. Since all the three fractures and the loss of teeth are inter-connected, there is considerable overlapping in this case. A sum of $6,000 should therefore be deducted, leaving a figure of $19,000 which, I think, is fair and reasonable and not out of line with most of the awards given for similar injuries.

Dalam kes *Saw Tong Seng v Ong Kim Hoon* [1968] 1 MLJ 203, hakim Mahkamah Tinggi Singapura di ms 205 berkata:

A It is by now accepted that award should be in line with a discernible trend or pattern of awards in reasonably comparable cases because it is highly desirable that in similar cases involving persons who are of similar age, social and working habits, earning capacities and intellectual as well as recreational pursuits, etc, there should be as much uniformity as it is possible to achieve. This will tell a suitor roughly what be can expect by way of compensation and at the same time, enable defendants to anticipate what their liabilities are likely to be.

Dalam kes *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237, Mahkamah Persekutuan di ms 238 berkata:

C As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amounts awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide. The general principle is that an appellate court can only interfere with a assessment if it is considered so inordinately high as to make the court exclaim. 'Good gracious, is that the sum which has been awarded — that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

F Dalam kes *Phuah Jee Suan v Nila Vasu Pillai* [1973] 1 MLJ 186, Mahkamah Rayuan Singapura di ms 188 berkata:

When there are several injuries, it is not proper to add up what each would be worth separately; there is likely to be some overlap because much of the general handicap and discomfort may be common in both eg detention in hospital, G inability to move about or enjoy recreation. The principle or scaling down the total sum assessed for several injuries on the ground of overlapping is too well established for it to be disregarded. It was reaffirmed and applied recently in *Wieland v Cyril Lord Carpets Ltd*. In applying the principle of overlapping, Eveleigh J said, at p 1011:

H In so far as the injury to the ankle is concerned, I find it difficult to value it in isolation because it does, to a measure, overlap the other injury in the sense that the loss of amenities of life and discomfort experienced by the plaintiff resulted from two simultaneous operating causes … It would therefore be wrong in my view to value the second injury as through the first has not taken place and then I to add the two figures together.

In *Wharton v Sweeney*, Ormerod LJ referred to the question in these words:

> It is well there should be some consistency, and the amounts awarded in the past are a useful and general guide — bearing in mind the variation of circumstances and bearing in mind too — and this is important — the changes in the value of money over the years

And in *Aiken v Port of London Authority*, Willmer LJ said:

> Our attention was drawn to other cases where this court has had to deal with similar injuries sustained. They were mostly cases decided some ten or twelve years ago … As was pointed out by Mr Marven Everett, some allowance has to be made for the fall in the value of money since these cases were decided. He might, I think, have gone on to observe that in any damages awarded now allowance should be made for the possibility that the value of money may continue to fall in the future.

In *Sands v Devan*, Lord Normand said, 'Since we must perforce measure the damage in money, we must, I think, take account of large and relatively permanent variations in the value of money'. And Lord Moncriff added, 'As regards what falls to be paid in money the court must take note of changes in the value of money'.

It would be extremely difficult, if not, impossible, for a judge to assess proper damages without some guidance from past cases and the principle of having regard to awards in comparable cases has been approved by the House of Lords in *H West & Son Ltd v Shephard*, and also by the Privy Council in *Jag Singh v Toong Fong Omnibus Co, Ltd*. It is therefore imperative that where an old comparable case is considered, there should be an adjustment for the change in the value of money which should be reflected in the award. The difficulty always is in ascertaining the change or the comparative value of money at two different dates several years apart. In this connection it is futile to refer to the fall in the purchasing power of the English pound. As was pointed out by the Judicial Committee in *Jag Singh v Toong Fong Omnibus Co Ltd*, comparisons should be made with cases 'in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist'.

The economic conditions in England and Singapore are vastly different. As was said by Salmon LJ in *Fletcher v Autocar and Transporters Ltd* at p 750:

> The damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant, but would consider them to be sensible and fair.

Such an assessment can be reached only by the collective instinct of the judges, using their knowledge of the current values of not only money but society as well, for the assessment of personal loss is to express its worth in dollars and cents according to current social standards as reflected in the general level of awards by the courts.

The quantum of damages is very much a question of fact and degree and a court of appeal is always reluctant to interfere with the assessment of a judge unless there has been misdirection in law, or the amount is manifestly too much or too little. As

was pointed out by Viscount Simon LC in *Nance v British Columbia Electric Rail Co Ltd*, an appeal against the decision of a judge upon the quantum of damages will not be allowed unless either:

(i) the judge has applied a wrong principle of law; or

(ii) the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Dalam kes *Topaiwah v Salleh* [1968] 1 MLJ 284, Azmi HB (Malaya) (pada masa itu) di ms 285 berkata:

> The difficulty of laying down the principles on which damages are awarded has frequently been recognised. However, as Lindley LJ in *Rodocanachi v Mibburn Brothers* stated:
>
> > It must be remembered that the rules as to damages can in a nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries.
>
> Or another way of putting it — that it is a matter of assessment but not of calculation. So far as this court is concerned we should, to paraphrase Greer LJ in *Flint v Levell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.
>
> If I had tried this case in the first instance, having regard to previous awards in more or less similar cases probably I would not have awarded as much as $19,000 but I am not convinced that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high as to make it an entirely erroneous estimate of the damage to which the respondent is entitled.

Dalam kes *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50, Mahkamah Persekutuan di ms 52 berkata:

> In the circumstances, we find the figure of $113,000 on the itemisation process to be highly inflated and unreliable and as such it cannot be said that the figure is consistent with the global award made by the learned judicial commissioner.
>
> In an appeal against quantum in running down cases, this court had laid down in *Mahmod bin Kailan v Goh Seng Choon & Anor* that the questions to be asked are — has the trial judge acted on a wrong principle of law or had he misapprehended the facts or had he made a wholly erroneous estimate of the damage suffered?
>
> Although it is almost impossible to standardise damages for pain and suffering and loss of amenities in running down cases, it is in the interest of all concerned that the trend of awards should be maintained so that insurance companies and

practitioners have some idea as to how these cases will ultimately be dealt with here. This will facilitate out of court settlement or at least agreement on quantum and will no doubt benefit road accident victims (see *Seenivasan & Anor v Lim Yew Seng*). The learned commissioner did not seem to consider adequately the authorities cited before him. Nor did he give any indication as to how he had arrived at his estimate. Had he done so we might probably have found it difficult to disturb his assessment.

Dalam kes *Seenivasan & Anor v Lim Yew Seng* [1961] MLJ 22, Mahkamah Rayuan di ms 23 berkata:

There can be no question of standardising damages in these running down cases coming under the Civil Law Ordinance. Nevertheless we are endeavouring to scrutinise such of them as come before us on the same principles. That is in the benefit of the public as a whole because obviously if insurance companies and practitioners have some idea as to how these cases will ultimately be dealt with here it should facilitate settlements.

We are of the opinion that the fractures and the other connected injuries should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation (*Mahamad bin Mohamad Said & Anor v Perianayagam & Anor* [1972] 1 MLJ 67).

Dalam kes *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22, Mahkamah Persekutuan di ms 23 berkata:

The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing, indeed, it is its duty to reverse the finding of the trial judge (Rujuk kes *Nordin bin Haji Abdul Wahab v Mohamed Salleh bin Hassan* [1986) 2 MLJ 294 di ms 296).

Dalam kes *Nordin bin Haji Abdul Wahab v Mohamed Salleh bin Hassan* [1986) 2 MLJ 294, Mahkamah Agong di ms 296 berkata:

We also aware of the special difficulty in an appeal against quantum. The finding that a trial judge has erred in the direction of being too generous would not by itself constitute a matter to be appealed from and the appellate court is always slow to reverse the trial judge's decision on assessment of damages unless there are strong grounds for interference. See *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153.

A Dalam kes *Greenfield v London and North Eastern Railway Co* [1945] KB 49, MacKinnon LJ had this to say:

> The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

B

Lord Evershed MR in *Wilson v Pilley* emphasised that:

C

> … interference by this court with an award of damages by the trial judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages, small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

D

We would also refer to *Elliot v Preston* [1971] 2 LLLR 328 where Salmon LJ had this to say:

E

> Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. It you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree … that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.

F

> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge had acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge.

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H

> Turning now to the present case we are firmly of the view that the learned judge acted erroneously when he misdirected himself in law and in fact in his assessment of the damages.

I

> Reverting to the facts of this case, it will be seen that the deputy registrar was clearly in error in assessing general damages in the manner in which he did. On the facts, the principle of overlapping was applicable and he was wrong in not scaling down the total on the account. He was also wrong in assessing total damages first

and then applying a blanket increase of 20 per cent. The increase in the cost of living should have been taken into consideration by the learned deputy registrar in assessing the amount of general damages. In other words a lump sum should have been awarded after taking into consideration all the relevant factors including the increase in the cost of living.

The quantum of damages is very much a question of fact and degree and a Court of Appeal is always reluctant to interfere with the assessment of a judge unless there has been misdirection in law, or the amount is manifestly too much or too little. As was pointed out by Viscount Simon LC in *Nance v British Columbia Electric Rail Co Ltd*, an appeal against the decision of a judge upon the quantum of damages will not be allowed unless either:

(i) the judge has applied a wrong principle of law; or

(ii) the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

In assessing damages under this head the learned judge classified the injuries under four separate items. The first item relates to facial injuries which include three fractures, loss of nine teeth apart from extensive bruises and swelling over the right half of the face, as described earlier. The learned judge made separate awards for the fractures and the other injuries under this item for which she arrived at the sum of $31,500 but deducted $5,500 for overlapping and awarded $26,000 as damages.

In examining this award we confined ourselves to the question whether the judge had applied the correct principle or whether the assessment of damages was perverse (per Salleh Abas FJ, as he then was, in *Lim Eng Kay v Jaafar bin Mohd Said* and *Rasidin bin Partorjo v Federick Kiai*. We are of the opinion that the fractures and the other connected injuries should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation (*Mahamad bin Mohamad Said & Anor v Perianayagam & Anor*).

In considering the award under this head the learned judge did not place any reliance on the authorities cited for comparison on the ground that the injuries were quite unlike the injuries suffered by the respondent. She applied her experience in adjudicating cases of this nature and awarded a global sum of $40,000 as damages. With respect we do not consider it proper for the learned judge to discard the authorities and use her own experience in assessing the damages. Experience alone however long without resorting to comparable cases which are the best guides, may result in speculation.

That having said, I am, however, of the view that the proper approach is to make one single award under this head. It is conceptually wrong to confine separate awards to cosmetic injuries, if separate awards are to be made under this head. Logically, why then shouldn't separate awards be made to mental impairments, anxiety and shock, or even for each physical injury to the limbs? It cannot be right for the court to make a separate award for each and every type of different injury and then ad them all up as a total award. It has always been the proper approach to view the overall general situation of the plaintiff,

A including factors such as injuries, sufferings, disabilities and impairment in enjoyment of life, and assess all such factors as a whole to come to an expression of compensation in monetary terms. I failed to see the justification of singling out cosmetic injuries as a distinct factor meriting special treatment. The proper approach is to take an overall view of the plaintiff's situation comprehensively, embracing all relevant factors which can cumulate into one single monetary sum B (at pp 9–10).

Dalam kes *Zamri Md Som & Anor v Nurul Fitriyaton Idawiyah Nahrawi* [2002] 1 CLJ 309, Mahkamah Tinggi telah merujuk kepada kes *Tan Cheong Poh & Anor v Teow Ah Keow* [1995] 3 MLJ 89, dan berkata seperti berikut: C

It has been long established that in a claim for damages for personal injuries the court awards a lump sum. The principle of scaling down the total sum assessed for several disabilities on the ground of overlapping is too well established to be disregarded. Thus, where the disabilities stem from one injury, the extent of overlap will be such that there would be a merger. The practice of making separate D assessments for the different disabilities that arise from the same injury and then to make a reduction or an allowance for overlapping is wrong. Unless there is a distinct remoteness between the disabilities and pain and suffering that arise from different injuries, the approach in assessing damages for pain and suffering and loss of amenities should be towards awarding one lump sum.

E

Dalam *Kuan Kian Seng v Wong Choon Keh* [1995] SGHC 43, Mahkamah Tinggi Singapura memutuskan:

where disabilities stem from one injury, the extent of overlap will be such that there F would be a merger and hence, allowance for overlapping in computing the award for pain and suffering and loss of amenities is not good enough. In this case, all the disabilities suffered by the plaintiff stemmed from one injury, ie, the brain damage and thus, the judge was right in making a lump sum award instead of making separate assessments for physical and intellectual disabilities, and to allow for overlap thereafter.

G

On the issue of overlapping, it seems to me that the law is also settled, in that a deduction is permissible where the injuries involve considerable overlapping.

Dalam kes *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286; [1981] CLJ 171, Chan H (pada masa itu) berkata: H

Awards tend to increase in value in recent years because of the fall in the value of money … There is a discernible trend for awards to increase in value in recent years. This is because judges have taken into account the fall in the value of money.

I Dalam kes *Ng Chi Chiung lwn Lau Kam Ping* [2000] HKC 759, Mahkamah Tinggi berkata di ms 765:

… the proper approach is to make one single award under this head. It is conceptually wrong to confine separate awards to cosmetic injuries, if separate awards are to be made under this head. Logically, why then shouldn't separate

awards be made to mental impairments, anxiety and shock, or even for each physical injury to the limbs? It cannot be right for the court to make a separate award for each and every type of different injury and then add them all up as a total award. It has always been the proper approach to view the overall general situation of the plaintiff, including factors such as injuries, sufferings, disabilities and impairment in enjoyment of life; and assess all such factors as a whole to come to an expression of compensation in monetary terms. I failed to see the justification of singling out cosmetic injuries as a distinct factor meriting special treatment. The proper approach is to take an overall view of the plaintiff's situation comprehensively, embracing all relevant factors which can cumulate into one single monetary sum.

[34] Setelah membaca dan meneliti rekod rayuan dan hujah-hujah oleh kedua-dua pihak bersama autoriti dan prinsip undang-undang mengenai cara award yang harus diberikan dan patut diambil kira untuk ganti rugi am kepada seorang yang mengalami kecederaan akibat kemalangan jalanraya dan tugas kehakiman oleh mahkamah perbicaraan, keputusan mahkamah ini adalah:

Mahkamah ini tidak bersetuju bahawa sekiranya tidak ada hujah-hujah oleh peguam bagi pihak penentang, dalam kes ini oleh peguam defendan-defendan di mahkamah perbicaraan untuk ambil kira '*overlapping*'. Mahkamah perbicaraan tidak perlu ambil kira '*overlapping*' kerana ini akan bercanggah dengan tugas kehakiman mahkamah perbicaraan (judicial function) untuk menentukan award yang diberi bagi ganti rugi am dan ia harus mengikut trend award dan prinsip undang-undang tentang award untuk ganti rugi dan pastikan award tidak terlampau tinggi (manifestly) atau kurang (rujuk kes *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahamad* [1985] 1 MLJ 50 dan *Ngooi ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30). Walau bagaimanapun dalam kes ini, mahkamah ini mendapati peguam defendan-defendan ada berhujah bahawa 10% harus dipotong atau diambilkira untuk *overlapping* (rujuk ms 64 rekod rayuan). Di atas alasan itu sahaja dan apabila didapati award yang diberi oleh hakim mahkamah sesyen yang bijaksana dalam kes ini telah dijumlahkan award-award yang diberi berasingan bagi sesuatu kecederaan dan tanpa mengambilkira '*overlapping*' adalah satu '*misdirection*' dan bertentangan dengan prinsip undang-undang, di mana harus diperbetulkan oleh mahkamah ini.

[35] Oleh itu award yang diberi oleh mahkamah perbicaraan kepada kecederaan yang dialami oleh seorang mangsa mengakibatkan atau disebabkan dalam satu kemalangan jalanraya dan dibicarakan di mahkamah rendah setiap hari patut berkonsisten dan mengikut trend award. Perkara ini adalah penting supaya pihak-pihak dapat mencapai persetujuan di atas ganti rugi am dan bicara diteruskan terhadap liabiliti jika dapat persetujuan terhadap ganti rugi am dan ini akan mengurangkan masa kehakiman (rujuk kes *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ

50 di ms 54 dan kes *Seenivasan & Anor v Lim Yew Seng* [1961] MLJ 22). Dalam keadaan tersebut ada kemungkinan lebih banyak kes boleh dilupuskan tanpa kecualikan keadilan atau mempercepatkan keadilan.

Mahkamah ini tidak bersetuju award yang diberi oleh hakim mahkamah sesyen adalah award yang berpatutan seperti yang dihujahkan oleh peguam bagi plaintif di mana mahkamah ini berpendapat, *overlapping* juga harus dan patut diambil kira dan patut diberi diskaun atau potongan. Sebaliknya, mahkamah ini bersetuju bahawa award yang diberi patut dan harus diambil kira *overlapping* bagi kecederaan yang dialami oleh plaintif di bahagian badan yang sama. Di sini adalah penting untuk mengambil perhatian bahawa award yang diberi untuk kecederaan yang disebabkan dalam kemalangan jalanraya adalah untuk *pain* and *suffering* and *loss of amenities* seorang plaintif dan bukan diterima sebagai durian runtuh (windfall).

(Rujuk kes *Kanan a/l Subramaniam dan satu lagi lwn Aman Syah Abadzyuid* [2002] 7 MLJ 561; [2002] 6 CLJ 34 di ms 50 yang mengikut kes *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50; [1984] 2 CLJ 227), di mana mahkamah dalam kes tersebut memutuskan:

> Mahkamah ingin berkata bahawa sebarang award yang dibenarkan oleh mahkamah bagi kecederaan plaintif memang tidak boleh membawa kaki yang asal kepada plaintif sebelum kecederaan yang dialami di kemalangan tetapi mahkamah harus berkonsisten (there must be some consistency and certainty) atau satu ceiling di atas award supaya award itu tidak melampaui (exorbitant) dan dipastikan bukan mengikut kesukaan seseorang peguam atau kesukaan seseorang hakim mahkamah sesyen ataupun seorang majistret kepada sesuatu individual tetapi harus mengikut 'trend of awards' kepada sesuatu kecederaan yang sama kalau tidak keseluruhan Industri Insuran akan jatuh (collapse) dan akibat itu, ini mungkin akan membawa kelemahan kepada ekonomi atau tidak sihat kepada ekonomi negara kita.

Dalam kes ini, mahkamah ini mendapati bahawa award yang diberi kepada plaintif secara berasingan adalah kepada kecederaan-kecederaan di bahagian yang hampir sama di mana *pain and suffering and loss of amemities* yang dialami adalah sama. Dalam keadaan tersebut, mahkamah perbicaraan tidak boleh memberi award berasingan bagi sesuatu kecederaan dan jumlahkan award yang diberi secara berasingan dari award ganti rugi kerana proses *itemisation* akan meningkat dan memberi satu award yang *unreliable* dan tidak memberi satu award yang munasabah. Soalan yang harus dipersoalkan adalah sama ada hakim perbicaraan telah bertindak di atas prinsip yang salah dari segi undang-undang atau telah salah ambil kira fakta atau telah membuat satu taksiran yang terkhilaf terhadap ganti rugi yang dialami oleh plaintif (rujuk kes *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* (1985) 1 MLJ 50 di ms 52).

[36] Mahkamah ini berpendapat bahawa hakim perbicaraan sepatutnya dan harus mengambilkira '*overlapping*' jika kes itu adalah satu keadaan

di mana mahkamah perlu mengambil kira '*overlapping*' walaupun tidak ada hujah daripada pihak penentang kerana tugas mahkamah adalah untuk pastikan bahawa keputusan, khususnya, award yang diberi adalah tidak melampau dan tidak kurang. Mahkamah perbicaraan tidak boleh menjalankan tugas sebagai satu '*recording machine*' atau secara mekanikal dan perlu meneliti, menimbang dan menilai keterangan secara kehakiman dan mengambilkira semua kecederaan, prinsip undang-undang dan trend award bagi kecederaan yang sama atau hampir sama. Mahkamah perbicaraan sepatutnya berpandukan award-award dari kes-kes lain sebagai satu garis panduan sahaja dan bukan semata-mata terima award itu tanpa membezakan jenis kecederaan yang dialami oleh plaintif dan *permanent disability* dan dengan award-award yang lain dan prinsip undang-undang bagaimana ganti rugi am untuk kecederaan patut diawardkan.

[37] Mengikut laporan perubatan bertarikh 26 April 2003 daripada Hospital Segamat dan Hospital Sultanah Aminah bertarikh 31 Julai 2001, plaintif mengalami kecederaan seperti berikut:

(a) *compound fracture left tibia/fibula*;

(b) *fracture left patella*;

(c) *left temporal subgalae haematoma*; dan

(d) *fracture left body of mandible and right zygomatic complex*.

Walau bagaimanapun, mengikut laporan pakar bertarikh 5 Februari 2003 daripada Dr Mohd Nasiruddin Johari, Kuantan Medical Centre Sdn Bhd, Dr Esther YY Chong dari KS Leu Dental Surgery bertarikh 5 Mei 2005, Dato' Dr T Vasantha Kumar dari Hospital Tengku Ampuan Afzan, Kuantan bertarikh 12 Julai 2005, Dr Abdul Muin Ishak dari Hospital Pakar Ampang Putri bertarikh 7 Oktober 2005 dan daripada Dr Azlin Azizan dari Hospital Pakar Ampang Putri bertarikh 21 September 2005, mahkamah ini berpendapat award untuk *pain and suffering* dan *loss of amenities* dan sebarang *disabilities* tidak boleh diberi secara berasingan bagi setiap satu kecederaan kerana *pain and suffering* bagi sebahagian kecederaan harus diambil kira bersama dan tidak boleh diberi award secara berasingan dan seterusnya menjumlahkan award tersebut seperti yang dibuat oleh hakim mahkamah sesyen yang bijaksana (rujuk penghakiman bertarikh 25 April 2007 di bawah tajuk ganti rugi am di ms 17–18 rekod rayuan).

(1) Mengikut laporan pakar bertarikh 5 Februari 2003 daripada Dr Mohd Nasiruddin Johari, Kuantan Medical Centre Sdn Bhd, pendapat pakar tersebut adalah seperti berikut:

HISTORY

He met with a road traffic accident on 9 September 2001 and sustained the following injuries (according to the report by Dr Gurmit Singh from Sultanah Aminah Hospital Johor Bahru):

(1) Compound fracture left tibia/fibula;

(2) Fracture left patella;

(3) Left temporal subgalea haematoma; and

(4) Fracture left body of mandible and right zygomatic complex.

Treatment and progress;

Plating left fibula. Screw fixation medial and posterior malleoli. External fixation left tibia.

His present condition is summarised as follows:

(1) Aching pain left knee and left ankle when standing or walking for a long time.

(2) Unable to squat fully and hence unable to pray in proper positions.

(3) Unable to carry heavy loads or perform heavy works.

(4) Unable to work in his oil palm plantation (Felda scheme). He is now working as a security guard. He has to hire somebody to work in his plantation.

EXAMINATION

GENERAL

— Alert and rationale

— Mild limping gait

LOWER LIMB LENGTH

(Measured form Ant Sup Iliac Spine to Med Mall)

— Right: 79 cm

— Left: 79 cm

THIGH CIRCUMFERENCE

— Right: 40 cm

— Left: 39 cm

LEFT KNEE

— Acurvilinear scar over anterior aspect 11cm long

— Tenderness over both facets of patella

— Laxity of posterior cruciate (2+) and lateral collateral (2+) ligaments

— Other ligaments stable

— Range of movements full

LEFT ANKLE

— A scar over medial malleolus 9cm

— A scar over lateral aspect of lower third of leg 14cm long

— No tenderness

— Range of movements from dorsiflexion 5 deg. To plantarflexion 50 deg (cf right ankle from dorsiflexion 20 deg. To plantarflexion 50 deg)

X-RAY FINDINGS

1 LEFT KNEE

— Avulsed fracture fragment medal aspect of patella but not involving the articular surface

— Osteophytes

2 LEFT ANKLE

— Malunited fracture (intra-articular) distal end of tibia with presence of two screws

— Malunited fracture lower third shaft of fibula with presence of plate and screws

— Small osteophytes around ankle joint

DIAGNOSIS

(1) Avulsion fracture medial aspect of patella left knee

(2) Early osteoarthritis patellafemoral joint left knee

(3) Laxity of posterior cruciate and lateral collateral ligaments left knee

(4) Malunited fracture distal end of left tibia

(5) Malunited fracture lower third shaft of left fibula

(6) Early osteoarthritis and stiffness ankle joint

(7) Scars over left knee and left ankle

OPINIONS

(1) The patient met with a road traffic accident on 9 March 2001 resulting in the injuries described above.

(2) His present status is summarised in the diagnosis above.

(3) He need treatment for the osteoarthiritis of left knee and ankle. I would advocate intra-articular injection of hylan (synvisc) for three doses one week apart for both joints. The total cost is RM 4,000. Thereafter he needs oral medications, glucosamine sulphate (cartilage nutrition) and meloxicam (Anti-inflammatory), which cost RM80a month. He has to take them for life. The above treatment will slow down the ongoing arthritic process.

(4) The implants in left ankle can be removed with cost of RM4,000.

(5) He cant do any heavy or risky jobs permanently because of the disabilities. He has difficulty to run or walk fast or standing for a long duration.

(6) His complaints are justified based on the above findings.

(2) Mengikut laporan pakar daripada Dr Esther YY Chong dari KS Liew Dental Surgery bertarikh 5 Mei 2005, pendapat pakar tersebut adalah seperti berikut:

DENTAL REPORT

On examination, patient complained of the following:

(a) Pain on opening mouth;

(b) Limited mouth opening;

(c) Parasthesia of lower lip from midline to corner of mouth;

(d) Parasthesia of lower chin form midline to corner of mouth;

(e) Parasthesia of buccal side of lower left gums;

(f) Pain of upper left teeth;

(g) Dryness of both eyes; and

(h) Double vision of both eyes

Clinical and radiographic findings:

1 *Extra oral examination*

(a) The patient's face appeared symmetrical

(b) Parasthesia on left side of lower lip and chin

(c) Deviation of jaw to the left on mouth opening

(d) Limited jaw opening (2 fingers)

(e) Scar measuring 3 cm over left side of mandible

(f) Normal eye movement; and

(g) Double vision in both eyes

2 *Intraoral examination*:

(a) Teeth missing; Lower left 2nd molar (37);

(b) Retained roots: Lower left 3rd molar (38);

(c) Teeth sensitive to percussion:

Upper right left 1st premolar (24), upper left 2nd premolar (25), upper left 1st molar (26), lower left 1st premolar (34), lower left 2nd premolar (35), lower left 1st molar (36); and

(d) Numbness of gums: around area of lower left canine (33), lower left 1st premolar (34), lower left 2nd premolar (35), lower left 1st molar (36). Numbness of buccal side of gums.

3 *Radiographic (OPG) findings*:

(a) Decayed teeth: Upper left 1st molar (26), Lower right 1st molar (46);

(b) Retained root: Lower left 3rd molar (38);

(c) Fracture of left body of mandible;

(d) Presence of screw fixture in left side of mandible;

(e) Visible abscess around root apices of lower left 1st premolar (34) and 2nd premolar (35);

(f) Extracted lower left 2nd molar (37); and

(g) Super-erupting upper left 3rd molar (28)

Diagnosis:

(a) Double vision and dryness both eyes;

(b) Paraesthesia of lip, chin and gums;

(c) Decayed teeth: upper left 1st molar (26) and lower right 1st molar (46);

(d) Retained roots: Lower left 3rd molar (38);

(e) Devitalized teeth: upper left 1st premolar (34) and 2nd premolar (35), lower left 1st molar (36);

(f) Extracted tooth: lower left 2nd molar (37); and

(g) Super-erupted upper left 3rd molar (28)

(3) Mengikut laporan pakar daripada Dato' Dr T Vasantha Kumar dari Hospital Tengku Ampuan Afzan, Kuantan bertarikh 12 Julai 2005, pendapat pakar tersebut adalah seperti berikut:

History:

Mohd Yunan Che Ya was alleged to be involved in a motor vehicle accident on the 9th March 2001.

The ophthalmologic evaluation carried out on the 15th April 2004 is as follows as per our medical records.

Mohd Yunan Che Ya complained of blurring of vision of both eyes since the alleged motor vehicle accident. This blurring of vision is for distant and near not associated with any redness, double vision, flashed of light or floaters.

Mr Mohd Yunan Che Ya did not disclose any systemic illness.

Eternal Examination:

Right Eye Vision: 6/6 best corrected and this is associated with hyperopia (Long sightedness). The near vision being N5 (normal).

The external ocular movements were noted to be normal.

The anterior and posterior examination of this eye was noted to be normal. The retina and optic nerve (nerve for vision) was noted to be normal.

Left Eye Vision: 6/6 best corrected with hyperopia (long sightedness). The near vision being N5 (normal).

The external ocular movements were noted to be normal.

The anterior and posterior examination of this eye was noted to be normal. The retina and optic nerve (nerve for vision) was noted to be normal.

Diagnosis:

(1) Both eyes: Refractive error, long sightedness

(2) Both eyes: Presbyopia (needing glasses for reading)

Prognosis:

The prognosis is determined by the regular wear of the prescribed glasses and if this is continued, the refractive error (long sightedness) should stabilise with time. This prognosis is coupled with the regular follow up of Mohd Yunan Che Ya with an optometrist for regular refraction of the prescribed glasses.

Recommendations:

Annual eye clinic follow up for refractive error and presbyopia.

Summary:

Mohd Yunan Che Ya needs spectacle prescription and annual assessment by an optometrist.

(4) Mengikut laporan pakar daripada Dr Abdul Muin Ishak dari Hospital Pakar Ampang Putri bertarikh 7 Oktober 2005, pendapat pakar tersebut adalah seperti berikut:

History:

En Mohd Yunan was involved in a road traffic accident at about 6am on 9 March 2001 in Jalan Segamat, Pahang. A motorcyclist, he was allegedly knocked down by a lorry. He had loss of consciousness about 10 minutes. He was initially admitted to Hospital Segamat before been transferred to Hospital Sultanah Aminah for further treatment. Based on the medical reports, he suffered from the following injuries:

(1) Head injury with laceration wound over the left temporal region;

(2) Compound fracture left tibia and fibula;

(3) Compound fracture of the left patella;

(4) Fracture of the left mandible; and

(5) Fracture of the right zygomatic complex

He under went wound debridement, plating of the left fibula and fixation of the medial and posterior malleolus. External fixation of the left tibia was also done. He was discharged from the hospital on 22 March 2001.

At present, he complaint of the following symptoms:

(1) *Very forgetful*

— Despite claiming to be very forgetful, he admits that he is still able to cope with his job as a security guard. He also denies ever been reprimanded by his superiors for been forgetful

(2) *Personality changes*

— He claimed that his wife often says that he is behaving weirdly, occasionally behaving like a child and speaks nonsense. He also admits to be more hot tempered, especially when somebody commented about his work.

He however does not complaint of headache, giddiness or loss of interest in his work.

Physical Examination

1 *General Examination*

He showed good eye contact and does not show any aggressive behavior during the interview. He dressed appropriately and shows interest in his surroundings. His answers to the questions were spontaneous and without hesitant. A healed scar about 5cm in length was noted over the left mandible. Healed scars were also noted over the left knee (10cm long), left leg (14cm long) and left medial melleolus (8cm long). His blood pressure (taken on sitting position) was 148/92 mm Hg and pulse rate was 69/minutes. Examination of the other systems (cardiovascular, lung, abdomen and limbs) was essentially normal.

2 *Conscious level*

His eyes open spontaneously, obeys commands and was orientated to time, place and person.

3 *Cognitive Skill*

His attention span was good and he understands questions and instructions well. Although at times he was slow to response to questions, his answers were generally spontaneously and without hesitant. He was able to name some common objects such as a wallet, tabletop computer and shoestring spontaneously. His speech was normal and not slurred. He was able to read, write and perform simple numerical calculations correctly (taking into consideration of his education level up to standard 6).

4 *Memory Test*

Memory tests examination indicated no obvious impairments to his immediate (able to repeat a sequence of five random numbers correctly) and recent memory (able to tell what he took for breakfast and dinner). His ability to recall remote (ask about events occurring prior to the accident) was satisfactory. His verbal memory was poor (he was unable to remember a short story when tested after 15 minutes). His visual memory was satisfactory (he was able to four out of six items on a tray when tested after 15 minutes).

5 *Reasoning & Problem Solving*

His reasoning and problem solving ability were good. He was able to interpret simple proverbs such as *berat tulang* and *kaki bangku*.

6 *Emotional State*

He does not appear to be in a depressed, anxiety or apathy state. His response to questions and his surroundings were spontaneous and appropriate. His mood was also appropriate and not liable.

7 *Cranial Nerves Examinations*

Examination of the cranial nerves was within normal limits.

8 *Motor System*

Apart from mild limitation of the dorsiflexion of the left ankle joint, there was no limitation to the rotational, flexion and extension movements of the other joints. There was no noticeable muscle wasting of the upper and lower limbs. Muscle tones and power were normal in all limbs.

9 *Sensory System*

Examination to the sensory system was normal in all limbs.

10 *Reflexes & co-ordination*

Examination of the reflexes and co-ordination sense were within normal limits.

Magnetic resonant scans (MRI) of the brain done on 21 September 2005 in our hospital indicated wild ventriculomegaly with early generalised widening of the cortical sulci and white matter ischemic lesions in the periventricular and left parietal lobe. No residual focal of old brain injury was demonstrated. The findings are indicative of early cerebral atrophy with chronic ischemic white matter lesion.

Conclusion

In conclusion, En Mohd Yunan suffered from cerebral concussion following a road traffic accident on 9 March 2001. In my professional opinion, after taking into consideration of the MRI scan findings, his complaints of forgetfulness and personality changes may not be solely attributed to the head injury.

(5) Mengikut laporan pakar daripada Dr Azlin Azizan dari Hospital Pakar Ampang Puteri bertarikh 21 September 2005, pendapat pakar tersebut adalah seperti berikut:

CLINICAL INFORMATION: MVA in 2001. Very forgetful now.

MRI BRAIN

5 mm axial T1, T2 and FLAIR, 5 mm sagittal and coronal T2 were acquired through the brain without IV contrast.

There is early generalise widening of cortical sulci and mild ventriculomegaly seen consistent with early cerebral atrophy appropriate for age group. A small chronic ischemic white matter lesion is seen in the left parietal lobe and early periventricular white matter ischemia, changes appropriate for age group. There is no further focal cerebral lesion seen. There is no evidence of residual focal old brain injury detected.

Brain stem and cerebellum appear normal. Diffusion weighted scan show no evidence of acute infarcation.

IMPRESSION:

Age related early cerebral atrophy and early chronic ischemic white matter lesion.

Mahkamah ini ada memerhatikan tentang kesilapan beberapa tarikh dalam laporan perubatan berikut:

(i) Laporan Perubatan Hospital Segamat:

Date of transfer to HSJB' pada 9.3.2003 yang sepatutnya 9.3.2001 di mana Laporan Perubatan Hospital Sultanah Aminah sahkan tarikh ini.

(ii) Laporan Perubatan Kuantan Medical Centre Sdn Bhd

History: He met with a road traffic accident on 9 September 2001 yang sepatutnya 9 March 2001 di mana tarikh ini juga disahkan dalam laporan yang sama di bahagian opinion.

(iii) Laporan Perubatan KS Liew Dental Surgery:

(a) The Medical Report from Hospital Sultanah Aminah Johor Bahru states the following:

Following alleged MVA on the 31.7.2001 (motorcycle v lorry), patient claims loss of consciousness.' Tarikh sebenar kemalangan adalah pada 9.3.2001 seperti di mana dalam perenggan laporan yang sama.

Walau bagaimanapun, seperti yang sedia maklum oleh semua pihak tarikh sebenar kemalangan ialah 9.3.2001 dan Mahkamah ini hanya berpandukan kepada semua kandungan laporan-laporan berkenaan tentang fakta kecederaan untuk mencapai keputusan terhadap ganti rugi am.

[38] Setelah diambil kira autoriti-autoriti yang dikemukan oleh kedua-dua pihak untuk menyokong hujah-hujah mereka dan prinsip undang-undang untuk ganti rugi am dan pendapat pakar dalam bidang kuasa kepada jenis kecederaan dalam bidang kuasa dan kesimpulan mereka. Mahkamah ini

berpendapat bahawa award-award yang diberi oleh hakim mahkamah sesyen yang bijaksana adalah terlampau tinggi mengikut prinsip undang-undang dan secara bagaimana award-award harus diberi pertimbangan. Award-award yang diberi oleh hakim mahkamah sesyen yang bijaksana seperti penghakiman bertulis bertarikh 19 Mac 2008 adalah terlampau tinggi, tidak mengikut trend award adalah terkhilaf dari segi undang-undang dan tidak boleh dikekalkan. Sejajar dengan itu, award-award yang dibenarkan oleh hakim mahkamah sesyen yang bijaksana harus diketepikan dan digantikan dengan award-award seperti berikut:

Bil	Butir-Butir	Jumlah
1	Bagi malunited intra-articular fracture distal end of left tibia and lower third shaft of left tibia (mengikut laporan pakar orthopeadic)	RM25,000
2	(a) Bagi avulsion fracture medial aspect left patella with tenderness over both facet patella, early osteoarthritis petellofemoral joint and mild stiffness left ankle and laxity of posterior cruciate and lateral collateral ligaments left knee. (mengikut laporan pakar orthopeadic)	RM40,000
	(b) Untuk kecederaan item 2 di atas, Mahkamah ini harus mengambil kira overlapping dan memotong 10% bagi *pain and suffering* dan untuk sebarang *disability* kerana kecederaan-kecederaan itu adalah di kaki yang sama. Tidak ada potongan atau *overlapping* bagi kecederaan di item 1.	RM36,000
3	Bagi cerebral concussion with left temporal subgalae haematoma (mengikut laporan pakar neurology)	RM30,000

4	Bagi fracture of left body of the mandible and right zygomatic complex (mengikut laporan pakar pergigian)	RM30,000
5	Bagi 'Scar' di lutut kiri dan buku lali kiri	RM10,000
.	Jumlah keseluruhan	RM131,000

Tidak ada award bagi *cost of future medication for osteoarthritis intra-articular injection of Hylan (synisc)* dan bagi *pain & suffering* untuk pembedahan masa hadapan seperti diawardkan oleh hakim mahkamah sesyen yang bijaksana kerana ini bukan ganti rugi di bawah ganti rugi am dan harus dibuktikan di bawah ganti rugi khas. Tidak ada award secara berasingan sebanyak RM4,000 bagi *muscle wasting left thigh* seperti diawardkan oleh hakim mahkamah sesyen yang bijaksana. Oleh itu, award-award yang diberi di bawah ganti rugi am bagi *cost of future medication for osteoarthritis intra-articular injection of Hylan (synisc), pain & suffering* untuk pembedahan masa hadapan dan untuk *muscle wasting left thigh* berjumlah RM34,000 yang diawardkan oleh hakim mahkamah sesyen yang bijaksana harus diketepikan kerana bagi *muscle wasting left thigh* telah pun dimasukkan dalam item 2 dan perbelanjaan perubatan masa hadapan dan *pain and suffering* untuk pembedahan di masa hadapan seperti yang diawardkan oleh hakim mahkamah sesyen sebanyak RM30,000 tidak dibuktikan bahawa telah dibelanja atau mesti akan diteruskan oleh plaintif. Juga tidak ada keterangan yang dikemukakan dalam perbicaraan atau pada masa penghakiman yang diberi pada 25 April 2007 iaitu lebih kurang empat tahun dari tarikh laporan pakar bertarikh 5 Mei 2003 bahawa plaintif telah membelanjakan amaun tersebut.

[39] Selanjutnya juga, tidak ada sebarang keterangan lanjut (further evidence) atau permohonan untuk kemukakan keterangan lanjutan terhadap perbelanjaan tersebut sama ada pada atau sebelum penghakiman diberi pada 25 April 2007 ataupun di peringkat rayuan ini di mana plaintif bebas untuk memohon bagi mengemukakan keterangan lanjutan tersebut sekiranya plaintif telah mengeluarkan perbelanjaan tersebut setelah perbicaraan berakhir. Oleh itu, mahkamah ini berpendapat bahawa hakim mahkamah sesyen yang bijaksana tidak boleh memberi award tersebut di bawah ganti rugi am dan di atas sebab-sebab seperti yang dinyatakan di atas. Dengan segala hormatnya, mahkamah ini tidak mengikut kes *Shanmugam a/l Gopal v Zinal Abidin bin Nazim & Anor* [2003] 3 MLJ 76; [2003] 1 LNS 118, kerana mahkamah tidak boleh membenarkan award tersebut hanya untuk membawa muktamad kepada tuntutan plaintif seperti diputuskan dalam kes tersebut melainkan mahkamah mengikut prinsip undang-undang terhadap award ganti rugi am seperti yang dinyatakan lebih awal di atas oleh mahkmah ini. Setelah meneliti prinsip yang diputuskan oleh Mahkamah Agung dan

Mahkamah Persekutuan serta Mahkamah Rayuan, seterusnya, plaintif mempunyai kebebasan untuk memohon bagi mengemukakan keterangan lanjutan sekiranya perlu tetapi tidak mengambil kesempatan itu untuk berbuat sedemikian.

[40] Mahkamah ini ingin menegaskan bahawa award-award yang diberi oleh hakim mahkamah sesyen yang bijaksana bukanlah satu keadaan seperti terlalu murah hati tetapi adalah terlampau tinggi dan terkhilaf dari segi prinsip undang-undang terhadap ganti rugi yang dibenarkan di mana mahkamah ini harus masuk campur. Lord Denning MR dalam kes *Ward v James* [1966] 1 QB 273 menyatakan:

> Lessons of recent cases show the desirability of three things: First, assessability: In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity: There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good. None of these three is achieved when the damages are left at large to the jury. Under the present practice the judge does not give them any help at all to assess the figure. The result is that awards may vary greatly, from being much too high to much too low. There is no uniformity and no predictability.
>
> I would add this. The assessment of damages is almost as difficult as the sentencing of offenders. In each it is important that similar decisions should be given in similar cases. Some of uniformity is achieved in criminal cases by leaving the sentence always to the judge, with an appeal to the court of criminal appeal. We can hardly put damages on a like footing. But cannot we do more than at present to secure some measure of uniformity?
>
> Can awards of juries be corrected? One remedy that has been suggested is that the Court of Appeal should be more ready to correct the verdict of a jury. This court should correct it in much the same way as it corrects the decision of a judge. After all, the test which it applies is very much the same. This court can interfere with the figure awarded by a jury if it is 'out of all proportion to the circumstances of the case'. It can interfere with the figure awarded by a judge if it is 'a wholly erroneous estimate of the damage suffered'. In each case 'excess implies some standard which has been exceeded': see *Mechanical and General Inventions v Austin*, n51 by Lord Wright, n52 and the only standard which this court can apply is to take the conventional figure awarded in comparable cases and see how far the award is above or below it.

Dalam kes *Watson v Powles* [1968] 1 QB 596, Lord Denning MR berkata:

> In modern times, when damages are assessed by judges sitting alone, this court has discouraged judges from going to much into detail. When I was a judge of first instance, this court told me that it was a mistake to sub-divide the amount. On the whole I think that this is right. There is only one cause of action for personal injuries, not several causes of action for the several items. The award of damage is, therefore, an award of one figure only, a composite figure, made up of several parts. Some of the parts may be capable of being estimated in terms of money, such as loss of future earnings. Others cannot truly be estimated in money at all but must proceed on a conventional basis, such as compensation for pain and suffering and loss of amenities (see *Ward v James* n(1)). At the end all the parts must be brought together to give fair compensation for the injuries.

Di atas keseluruhan kes ini, rayuan oleh defendan-defendan terhadap liabiliti dan kuantum seperti diputuskan oleh hakim mahkamah sesyen yang bijaksana pada 25 April 2007 (rujuk kepada penghakiman bermeterai bertarikh 25 April 2007 di ms 17–18 dan mengikut alasan-alasan penghakiman di ms 44–48) dibenarkan. Keputusan hakim mahkamah sesyen yang bijaksana terhadap liabiliti bahawa defendan pertama bertanggungjawab 100% bagi kemalangan tersebut diketepikan dan digantikan bahawa defendan pertama menanggung 80% dan kecuaian sertaan terhadap plaintif adalah 20%. Award berjumlah RM213,000 bagi ganti rugi am diketepikan dan diganti dengan RM131,000.

Faedah di atas ganti rugi seperti diawardkan oleh hakim mahkamah sesyen dikekalkan. Kos tindakan di mahkamah sesyen dibenarkan kepada plaintif dan seharusnya mengikut skala berdasarkan award seperti diperuntukkan dalam Kaedah-Kaedah Mahkamah Rendah 1980. Defendan-defendan dibenarkan kos rayuan ini, sama ada dipersetujui atau ditaksirkan dan deposit dikembalikan kepada peguamcara perayu-perayu.

Rayuan defendan-defendan dibenarkan.

Reported by Kanesh Sundrum